87-1186

No. .....

In The

Supreme Court of the United States

October Term, 1987

HORRIE DUNCAN, individually and in his official capacity as CARROLL COUNTY COMMISSIONER; PATTI BROWN, A. G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in their official capacities as members of the CARROLL COUNTY ELECTION BOARD,

Petitioners,

v.

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the writ of certiorari should be granted to resolve a confilct between the opinion of the Court of Appeals for the Second Circuit in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), and the Eleventh Circuit in its opinion below, 829 F.2d 1547 (11th Cir. 1987), as to the application of the Voting Rights Act, 42 U.S.C. § 1973, to single-member electoral offices?

(2) Whether the writ of certiorari should be granted in order to correct the effect of the Eleventh Circuit's mandate to apply the analysis set out in *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), to the facts of this case involving a single-member electoral office, which would result in imposing proportional representation in violation of the Voting Rights Act, 42 U.S.C. § 1973(b)?

(3) Whether the writ of certiorari should be granted to correct the Eleventh Circuit's error in finding that the District Court did not consider all relevant evidence relating to Respondents' constitutional challenge to Carroll County's sole commissioner system?

(4) Whether the writ of certiorari should be granted to correct the Court of Appeals' error in its determination that the District Court applied the wrong legal standard?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding, except as follows:

Spencer Tracy Teal is the successor in office to Horrie Duncan as Carroll County Commissioner.

Teresa Prince is the successor in office to Carol Martin as a member of the Carroll County Election Board.

Vachel Driver is the successor in office to Tommy Greer as a member of the Carroll County Election Board.

Rule 28.1 is inapplicable.

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The opinion of the United States Court of Appeals for the Eleventh Circuit was delivered October 19, 1987, and is attached at App. 1-39. The judgment entered thereon on October 19, 1987, is attached at App. 74-75.

The District Court's order finding in favor of Petitioners/Defendants on all claims was entered on April 29, 1986, and is attached at App. 40-61. The judgment entered thereon on April 30, 1986, is attached at App. 62-63.

The order of the three-judge panel denying a temporary injunction was entered November 20, 1984, and is attached at App. 67-68.

The District Court's order severing Petitioners from the City of Carrollton Defendants was entered January 17, 1985, and is attached at App. 69-70.

The District Court's order reviewing the taxing of costs was entered August 8, 1986, and is attached at App. 64-66.

The Eleventh Circuit's order consolidating appeals is attached at App. 71.

The District Court's order staying proceedings pending determination of this Petition was entered December 3, 1987, and is attached at App. 72-73.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit were entered on October 19, 1987. The jurisdiction of this honorable Court is invoked pursuant to Title 28 U.S.C. §§ 1254 and 2101(e).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

United States Constitution, Amendment XIII, Section 1.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

United States Constitution, Amendment XIV,
Sections 1 and 2.

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

United States Constitution, Amendment XV, Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Title 42, U.S.C. § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Title 42, U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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STATEMENT OF THE CASE

A.

Respondents brought suit in the U.S. District Court for the Northern District of Georgia challenging the single-

member county commission form of government for Carroll County, Georgia. Declaratory and injunctive relief under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and under Sections 2 and 5 of the Voting Rights Act of 1965, Title 42 U.S.C. § 1973, et seq. and § 1983, were sought. The action was originally filed against the City of Carrollton and its mayor and members of the City Council, in addition to the Commissioner of Carroll County and members of the Carroll County Election Board.

A three-judge panel denied a temporary injunction as to the § 5 claims by order entered November 20, 1984. App. 67. The county Defendants, i.e., Horrie Duncan, individually and in his official capacity as Carroll County Commissioner; Patti Brown, A. G. Ault, Carol Martin, James Gamble and Tommy Greer, individually and in their official capacities as members of the Carroll County Election Board, were severed from the City of Carrollton Defendants by order entered January 17, 1985. App. 69. Respondents settled their claims against the City of Carrollton Defendants, and this case proceeded to trial before Honorable G. Ernest Tidwell, U. S. District Judge on February 4-10, 1986. The District Court entered judgment in favor of the county Defendants and against the Respondents, and costs were assessed against the Respondents. App. 62.

Respondents appealed to the United States Court of Appeals for the Eleventh Circuit from the District Court's order denying substantive relief, and also from its award of costs in favor of Petitioners. Both appeals were consolidated. App. 71. The Court of Appeals reversed the District Court and remanded the case for further proceed-

ings and also vacated and remanded to the District Court its judgment as to costs. App. 74. This petition follows.

B.

Carroll County is located in the west central part of Georgia between the Atlanta metropolitan area and the Georgia-Alabama line. It consists of 495 square miles, and has a population according to the 1980 census of 56,346 (R6-146). Of that figure, 9,679, or 17.2%, are black persons, and 46,441, or 82.4%, are white (R5-100, 101). There are 39,517 persons eighteen years or older in the county, 6,051, or 15.3% of which are black (R5-100). There are seven municipalities in the county, the largest of which is the city of Carrollton, having a population of 14,078, 28% of which are black persons.

Carroll County is governed by a Commissioner, which office is held by a single individual, who is voted upon by the voters of the entire county. The Commissioner is elected by majority vote for a term of four years. The election district for that office is coterminous with the boundaries of Carroll County. The present one-person commissioner system was established by Ga. L. 1951, p. 3310, and has been in existence since January 1, 1953. It was continued by Ga. L. 1983, p. 4656. Since 1908, there has been a single commissioner except for the period from 1945 to 1952, when there was a three-member board. (Ga. L. 1908, p. 282; Ga. L. 1943, p. 844.) The only surviving member of the 1951 legislative delegation representing

Carroll County, former State Senator William Trotter, testified that there were no racial overtones or considerations in the introduction or passage of the 1951 act, and that it was properly advertised prior to its passage (R8-101, 102). The District Court found that no opposition to the change from a three-member board to a single-member commission in 1951 was expressed by any organization or individual, and there is no evidence that the change in the form of government was enacted or is being maintained with an intention to discriminate against minorities or of diluting minority voting rights. App. 42.

The Carroll County Election Board was created in 1974 by the General Assembly of Georgia, Ga. L. 1974, p. 3556, as amended by Ga. L. 1982, p. 540, and exercises the duties and powers of the Election Superintendent pursuant to *O.C.G.A.* § 21-2-70, et seq. Since its creation, the Election Board has consisted of twelve persons including the present five members, one of whom is a black person (R8-30). Those twelve have consisted of four white women, four white men, and two black men (R8-30).

At the 1984 elections, the Election Board utilized 145 poll workers of whom 18, or 12.4%, were black persons. (R8-31). The evidence at trial documented that the Election Board has submitted to the Department of Justice the requisite data and requests for preclearance of changes in election procedures, and in doing so, Board members have consulted with black leaders, especially Respondent Marvin Walker, and sought their input (R8-31, 35, 36; Petitioners/Defendants' Trial Exhibit 34).[1]

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[1] Petitioners/Defendants' Trial Exhibits are hereinafter cited as "Pet./Def. Tr. Ex. —."

Voter registration is carried out by a Board of Registrars. There are approximately 100 deputy registrars, of whom 24, or 24%, are black persons (Pet./Def. Tr. Ex. 35). Registration facilities are well distributed throughout the county, and in addition to the Courthouse, there have been satellite registration sites in an increasing number since at least 1979 (Pet./Def. Tr. Ex. 34, 35). There is a registration site at the West Georgia Regional Library in Carrollton, the director of which was a black man, Leroy Childs, for many years until his death on July 6, 1986. There are at least twenty-one additional registration sites, several of which are open nights and weekends. Each of the six high school principals in the county is a deputy registrar (Pet./Def. Tr. Ex. 35).

None of the Respondents' witnesses testified that they have ever been denied the right to register or to vote (R5-148; R6-13; R6-83, 84; R7-24; R7-91). Respondent Jeff Long first registered to vote in Carroll County in 1954 (R5-183), has been active in registration for some thirty-one years, and has never been denied the right to vote (R6-13). Long specifically stated that blacks were well represented in the registration process in Carroll County (R6-21).

Respondent Robert Springer testified that he did not know of anyone who had been denied the right to register and vote and described political processes in which he and everyone else was allowed to participate (R7-23, 24, 30). Respondent Marvin Walker, President of the City of Carrollton branch of the NAACP, also testified that he knew of no person who had been denied the right to vote other than a possible criminal; that registration places

were accessible to Carroll County citizens; and that he had never had a problem with James Crawford, the chief registrar, or the Election Board (R7-90-94). In fact, Walker testified that Crawford was very supportive of the NAACP's efforts to register blacks and to promote their participation in the political process (R7-94, 95). He also testified that the political process, with respect to voting, registration and speaking out on issues was open for everyone (R7-129).

Respondent James Wyatt clearly testified that blacks are not afraid to run for office in Carroll County, and that he knew of no person who had had any problem registering or in having been denied the right to vote (R6-67, 84). Wyatt also testified that he knew of no one who had been denied the opportunity to equally participate in the political process (R6-104).

Only one black person, Respondent Long, has run for the office of Commissioner in Carroll County. Although unsuccessful, Mr. Long admitted that he was well received while campaigning, and campaigned in both white and black neighborhoods, and was able to cover the entire county well (R6-8, 9).

Narva Farris was a black candidate for sheriff in 1980. He testified that he was invited to all public forums and that he openly campaigned in white neighborhoods (R6-195). He came in third of six candidates, missing a runoff by only 2.8 percentage points (R8-41, 42; Pet./Def. Tr. Ex. 33).

In 1984, when Farris ran again for sheriff, he again campaigned in white neighborhoods seeking white support

(R6-198, 199). In fact, Farris had told a tendered expert for the Respondents that each time his biggest support, perhaps as much as two-thirds, came from whites (R6-203; R7-201). Farris said he believed that Henry Robinson, a white candidate for sheriff in 1984, got a great deal of the blacks' support (R6-205). Farris testified that he had no problem covering the entire county to campaign (R6-194).

While Long and Farris were unsuccessful, other blacks have been elected to offices in municipalities within Carroll County: Robert Gamble, as mayor of Whitesburg (R6-25); Doyle McCain, as a City Councilman in Villa Rica, Georgia (R6-25); and William Simmons as a City Councilman in Temple (R7-142, 143). In the City of Carrollton, Joshua Mabry, a black man, was elected and re-elected over a white opponent to the Carrollton City School Board (R6-6); and Mabry's predecessor, L. S. Mollette, a black man, was elected to the City School Board over a white opponent in 1971 (R6-5).

In the 1984 elections, Judge Robert Benham of the Georgia Court of Appeals, a black candidate on the ballot in every precinct in the county, received 43.4% of the vote in Carroll County, which is well in excess of the black percentage of population; he led three white contenders, the next highest of whom received only 34.2% of the county vote; Narvis Farris, a black candidate for sheriff, received 15.4% of the vote for that office; and Rev. Jesse Jackson, on the ballot in every precinct in the Democratic presidential preference primary, received 5.4% of the county vote (R8-46, 47; Pet./Def. Tr. Ex. 33). In spite of this empirical evidence, Petitioners' tendered expert, Dr. Michael Binford, attempted to establish the existence of

racial bloc voting. He did so by analyzing only the Long race for Commissioner in 1976, the Farris races for sheriff in 1980 and 1984, and Rev. Jackson's vote in 1984. He ignored the Benham race in 1984 and all municipal elections in which a black candidate had run successfully, as well as the 1972 race in which Farris ran as a deputy on Sheriff W. J. Robinson's ticket. By his own admission, Binford failed to or could not take into consideration such factors as incumbency, name recognition and other criteria which some of the Respondents' own witnesses deemed to be important in the success or defeat of any particular candidate (R5-125-127). Further, Binford limited his analysis to black candidates *per se,* apparently ignoring any question as to other candidates possibly preferred by black voters.

The District Court found that there was no testimony concerning the issue of "white backlash," and whether whites have ever attempted to limit the field of candidates or hinder any black candidacy. App. 44. Nor did the evidence—including that of municipal elections—indicate that race was an overriding or primary consideration in the election of candidates. The Court concluded that the Respondents had not sufficiently demonstrated by a preponderance of the evidence that voting in Carroll County is racially polarized. App. 44. Likewise, the Court found that there was no evidence in the record that overt or subtle racial appeals had characterized any election within the last decade in Carroll County, and Respondents had not proven that race was made an issue during any campaign discussed at trial. App. 45. Respondents admitted at trial that there was no slating process, or lack of access to the same, shown by the evidence (R7-241, 242). There was

also no evidence of any anti-single shot voting provisions (R7-242).

The District Court found that Carroll County had made acceptable efforts in the present, as well as the past, to increase minority registration and that past discriminatory practices do not presently hinder blacks from registering and voting in Carroll County elections. App. 47. The Court noted that the Respondents unanimously testified that Chief Registrar James Crawford was helpful and made diligent efforts to see that every eligible person in Carroll County was registered. App. 47. The Court further found that voter registration facilities are currently dispersed throughout the county and are available to all citizens equally without regard to race, and that provisions are made to facilitate the registration of blacks. App. 48. It found no evidence to indicate that within the last decade any black was discouraged, prevented, or intimidated from registering or voting in an election. App. 48.

While no black has been elected Commissioner of Carroll County, the evidence clearly demonstrated the ability of blacks to form coalitions and the willingness of whites to seek their support. Runoff election data demonstrated this could be decisive. In 1976, Respondent Long ran for Commissioner and finished third, but his support was solicited by the two white candidates in the runoff, who had a 1.2 percentage point vote difference between themselves in the initial primary (R8-40; Pet./Def. Tr. Ex. 33). While a black bloc vote could easily have determined that election, Mr. Long declined to make an endorsement despite the other candidates' request for his support on the grounds that both had adopted his platform

(R6-16, 17). In 1984, the two top candidates for Commissioner were separated by 4.6 percentage points going into a runoff (R8-44; Pet./Def. Tr. Ex. 33). Since white candidates in both races actively sought black support (R6-16, 24), the opportunity to form a deciding coalition and swing the election was obvious.

Black persons have been appointed to county boards and commissions despite the relatively limited appointive power of the Commissioner under state law (R5-58-9; *O.C.G.A.* §§ 20-5-42; 31-3-2; 31-7-72; 49-3-2; 50-8-33; Ga. L. 1967, p. 2861; Ga. L. 1974, p. 2318). In addition to those black persons appointed to the Election Board, black persons serve or have served as jury commissioners, on the Carroll County Water Authority Board, the Department of Family and Children's Services Board, The Public Health Board, the Chattahoochee-Flint Area Planning and Development Commission, the Library Board, and the Hospital Authority Board (R5-149; R7-122, 130, 131, 133; R8-114; R8-72, 80, 81, 82, 136).

The District Court found that there was an indication that blacks in Carroll County are economically disadvantaged as compared to whites. App. 45. While some disparities do remain, several trends in the socio-economic conditions of blacks relative to whites have shown significant improvement in Carroll County since at least 1970 as shown by Pet./Def. Tr. Ex. 26, 27 (Tables 182, 184), 36, 37; R6-156-159, 164, 165. The District Court found that no evidence was introduced that county hiring is affected by discriminatory practices. App. 46.

Both the Carroll County and independent City of Carrollton School systems were desegregated about 1966

and 1967, which was accomplished voluntarily by the school governing authorities and without litigation (R6-48, 49; R8-202). The evidence demonstrated that in both systems there are no racial distinctions made regarding per-pupil expenditures, student-teacher ratios, capital outlays or other areas. The District Court found that the evidence indicated that an integrated education is now equally available to all persons in Carroll County, and that blacks are now an integral part of both educational systems. App. 46.

Regarding the issue of responsiveness of elected officials to the particularized needs of members of the minority group, the Court found that there was no testimony that either Horrie Duncan, Commissioner from 1968 through 1984, or Tracy Teal, Commissioner since January 1, 1985, has ever refused to listen to or meet with members of the black community about their concerns (R5-75; R5-148; R5-193; R7-117); App. 49. Other officials—the City School Superintendent (R7-9, 10), Election Board members, Voter Registrar, for example—were shown to readily consult with blacks concerning minority concerns.

There was no convincing evidence in the record that the provision of public services such as water, paving, fire protection, or otherwise are provided on any basis having to do with race.

The District Court found that there are sound logical reasons for the single-member commission form of government in Carroll County. App. 52. The testimony showed that the sole commissioner is required to view the county

as a community at large, and must be accessible to the citizens on a county-wide basis; this is particularly important in a county such as Carroll which contains seven incorporated municipalities with the potential for conflict among themselves and with the county, making the Balkanization of the county a possibility to be avoided. Furthermore, the sole commissioner is clearly accountable and responsible for whatever acts he or she does or fails to do, with little possibility of "passing the buck." While he or she may seek input in a variety of ways, decision making is expedited along with the responsibility and accountability for those decisions.

The lack of tenuousness in the county's use of a single-member office of commissioner was further demonstrated on March 13, 1984, when, concurrently with the Presidential preference primary, a non-biding referendum was held on the question of "should Carroll County change from a one-member to a multi-member commission? Yes/ No" (R8-48). There is no evidence in the record to indicate that any black person was discouraged, prevented or intimidated from voting in that election. Nor was there any evidence that any overt or subtle racial appeals were made with regard to that referendum, nor any evidence that race was a factor or even a consideration in that voting. Those voting in favor of a multi-member commission were only 43.8% of the voters, while 56.1% voted in favor of retaining a single-member commission (R8-49; Pet./ Def. Tr. Ex. 33).

ARGUMENT

I.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT BETWEEN THE OPINION OF THE SECOND CIRCUIT IN BUTTS v. CITY OF NEW YORK, 779 F.2d 141 (2d Cir. 1985), AND THE ELEVENTH CIRCUIT IN THIS CASE, AS TO THE APPLICATION OF THE VOTING RIGHTS ACT TO SINGLE-MEMBER ELECTORAL OFFICES.

The office of Commissioner of Carroll County, Georgia, is filled by one person elected by all voters in the electoral district. That electoral district is coterminous with the geographical boundaries of Carroll County, Georgia. Thus the office is identical in principle from the standpoint of how the officeholder is chosen to that of mayors, governors, attorneys general and other single-member offices whose holder is elected from an entire city or state. Certain county offices—sheriffs, clerks of court, probate judges—are the same.

While it is hardly likely one would argue in favor of these bodies being filled by several persons chosen from districts, the desirability of such an arrangement for the office of Carroll County Commissioner appears to have been pre-supposed according to the analysis utilized by the Eleventh Circuit. This is directly contradicted by the opinion of the Second Circuit in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), and the writ should be granted so this Court can clarify this dichotomy between the Circuit Courts.

The Eleventh Circuit assumed, erroneously, the applicability of *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) to the Voting Rights Act an-

alysis of the single-member body aspect of this case. Said the Eleventh Circuit:

> . . . The *Gingles* decision is important in many respects. We, therefore, measure the correctness of the trial court's decision in light of its holding. We note that the election procedure in *Gingles* required at-large voting for persons for a single district [multi-member district]. [*Sic.*] We consider the single-member county commission here to be in all essential respects comparable with the multi-member district discussed by the court in *Gingles*. It was the *at-large* election procedure in *Gingles* that commanded the court's attention.

City of Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1549 (11th Cir. 1987); App. 4.

Then, compounding the error, the Eleventh Circuit went on to require, upon a remand, the three-part *Gingles* analysis: (1) that the minority group demonstrate that the multi-member district is sufficiently large and the minority is sufficiently compact to be able to constitute a majority in a single-member district; (2) that the minority is politically cohesive; and (3) the degree of racially polarized voting. *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1562-1563 (11th Cir. 1987); App. 36-38. The specific question in *Gingles*, however, was whether *multi-member* legislative districts violated the Voting Rights Act, and one-member bodies were not at issue. *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 2758, 92 L.Ed.2d 25 (1986).

The Second Circuit Court of Appeals in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), considered the Voting Rights Act in conjunction with a single-member

body, the mayoralty of New York City, which is analogous in terms of how the officeholder is chosen to the Office of Commissioner of Carroll County.

Said the Second Circuit in *Butts*:

> " . . . We cannot, however, take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of elections for single-member offices."

Butts v. City of New York, 779 F.2d 141, 148 (2d Cir. 1985).

Such "uncritical transfer" is precisely what the Eleventh Circuit did in presupposing the desirability, and then mandating the imposition, of the *Gingles* factors for analyzing multi-member districts to the issues in this case.[2]

The *Butts* court went on, however, to offer a logical explanation:

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[2] The Eleventh Circuit particularly took issue with the District Court's sustaining Petitioners' objections "on relevancy grounds" according to the opinion, to Plaintiffs/Respondents' Exhibits 84, 85, 86, and 87, apparently relating to geographic concentration of voters by race in proposed three- and five-member forms of commission government. *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1563 (11th Cir. 1987). App. 38. The record, however, is clear that Petitioners' objection was "There has been absolutely no foundation laid for those, they have not been identified . . . ," and relevancy (R7-236). Respondents' counsel admitted that nobody in any testimony had identified or mentioned those particular maps (R7-238). This, it is respectfully urged, not only is a clear departure from accepted rules of evidence, but demonstrates an improper pre-disposition toward districts which infected the opinion's analysis. This is such a departure from the accepted and normal course of judicial proceedings as to call for an exercise of this Court's power of supervision as contemplated by Rule 17.1(a).

> . . . There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office. . . . [S]o long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. . . . The rule in elections for single-member offices has always been that the candidate with the most votes wins and nothing in the Act alters this basic political principle . . .

Butts v. City of New York, 779 F.2d 141, 148-149 (2d Cir. 1985).

Butts did not say the Voting Rights Act did not apply to single-member bodies. Certainly the Act would forbid restrictive practices such as literacy tests regardless of the office involved, but there is no evidence of such items in this case. But the Second Circuit in *Butts* went on and discussed whether ". . . the Act condemns any electoral arrangement that makes it more difficult for a minority class to elect one of its members to office. That is not the standard for determining violations of the Act." *Butts v. City of New York*, 779 F.2d 141, 149 (2d Cir. 1985). In *City of Richmond, Virginia v. United States*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975), this Court specifically noted that a reduction of blacks on the city council when white areas were annexed did not work a violation of the Voting Rights Act.

Reading these cases together, it is apparent that there is no violation of the Act if the voting and political strength of blacks is fairly represented in the selection process for the officer who is elected to the single-member body. See, for example, *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), note 17. It is clear from the record in this case that blacks are able to register and to vote without hinderance or impediment and therefore can participate equally in the selection of the officer to hold the single-member office. It is further clear that a candidate's running from an at-large seat is not automatically invalid as was shown by *City of Port Arthur, Texas v. United States*, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982).

Thus, the Eleventh Circuit's reliance on the *Gingles* test is, in the context of this case concerning a single-member body, and with all due respect to that honorable Court, neither legally nor logically warranted. This Court should, it is respectfully contended, grant the writ and resolve this analytical schism between the Circuits.

II.

THE WRIT SHOULD BE GRANTED IN ORDER TO CORRECT THE EFFECT OF THE ELEVENTH CIRCUIT'S MANDATE TO APPLY THE GINGLES FACTORS TO THE FACTS OF THIS CASE INVOLVING A SINGLE-MEMBER OFFICE, WHICH WOULD RESULT IN IMPOSING PROPORTIONAL REPRESENTATION IN VIOLATION OF THE VOTING RIGHTS ACT.

The Eleventh Circuit's mandate to apply the factors set out in *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), runs afoul of the language of the

Voting Rights Act itself: "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

Respondents seek to have the single-member office of Commissioner of Carroll County replaced with a board elected from districts. Logic compels the finding that if enough districts are created, eventually a sufficiently compact, politically cohesive minority will constitute a majority in some district. Thus, it follows that the Eleventh Circuit's mandating the *Gingles* analysis in this case does nothing except create proportional representation in violation of the Voting Rights Act.

The Eleventh Circuit failed to identify how the *Gingles* factors should be applied to this case—a not surprising omission since *Gingles* was concerned not with single-member bodies as was *Butts*, but with legislative districts. If, on remand, the District Court is required to apply the *Gingles* test to an unknown and apparently open-ended number of positions, then it is a truism that eventually it will find a point where any minority group will be able to make out a Section 2 claim under the *Gingles* analysis. Thus, a right of proportional representation is created contrary to the language of the Act. The reasoning of the Second Circuit in *Butts* avoids this anomalous result where single-member bodies are concerned.

A single-member body is not prohibited *per se* by either the Voting Rights Act or the United States Constitution. *City of Port Authur, Texas v. United States*, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982). The Constitution of the State of Georgia has long recognized the right of the people of a local political subdivision to choose

the form and structure of their local governing authority. Georgia Constitution 1983, Article IX, Section I, para. 1. So long as there are no artificial barriers created, such as impediments to registering voters or voting, the single-member office for which all of the eligible voters are entitled to vote represents one of the most pristine forms of representative government. In the absence of such barriers, with minority voters not comprising a majority in the electoral district for the single-member body, Respondents' § 2 claim must fail under a *Gingles* analysis even if it were to apply. But since all persons have equal opportunity to choose the person who will serve in the office of Commissioner, no violation of either the Voting Rights Act or the Constitution is worked in this case.

The Eleventh Circuit's opinion would create anomalous and unintended results, a product of erroneously mandating the application of the *Gingles* test to this single-member body. The Second Circuit in *Butts* correctly recognized the peculiar nature of single-member offices and avoids such results. It is respectfully urged that this honorable Court grant the writ of certiorari to the Court of Appeals for the Eleventh Circuit and review and correct the errors of law committed by that honorable Court.

III.

THE WRIT SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' ERROR IN FINDING THAT THE DISTRICT COURT DID NOT CONSIDER ALL RELEVANT EVIDENCE RELATING TO RESPONDENTS' CONSTITUTIONAL CHALLENGE TO CARROLL COUNTY'S SOLE COMMISSIONER SYSTEM.

The Court of Appeals reversed the decision of the District Court which had found that there had been no dis-

criminatory intent in the enactment of Carroll County's sole commissioner form of government. The basis of this was the Court of Appeals' conclusion that the District Court did not give consideration to the slight evidence which Respondents introduced to attempt to show that there was a discrinminatory motive. That evidence—primarily a newspaper clipping from 1947 quoting a Carroll County representative about the so-called white primary bill, a completely different piece of legislation from the 1951 act creating the single commissioner system—was indeed considered by the District Court in reaching its decision. The District Court's opinion at App. 61 clearly states:

> The plaintiffs urge the court to infer from a newspaper article and other pieces of legislation that the proponents of the at-large system had discriminatory motives. The court, though, concludes that after analyzing all the aggregate facts including all the *Zimmer* factors, the plaintiffs have failed to establish by a preponderance of the evidence that "racial discrimination was [or is] [*sic*] a motivating factor" for the present system.

Contrary to the Court of Appeals' opinion, the District Court did consider the Respondents' evidence and simply found it not to be sufficient to prove their allegation with regard to the constitutional challenge. The § 1983 claim was also disposed of in favor of Petitioners.

Petitioners maintain that under the proper standard of review to be applied to the District Court's decision by the Court of Appeals there is no ground for reversal of the District Court's decision. Although the Court of Appeals

acknowledged that the F.R.Civ.P. 52(a) "clearly erroneous" test is the appropriate standard of review for the District Court decision, it, in reality, ignored that standard by judging the weight and credibility of the evidence which was considered by the District Court. That review by the Court of Appeals was error and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. Thus it is respectfully urged that the writ be granted and the errors committed by the honorable Court of Appeals be reviewed and corrected.

IV.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS ERRED IN DETERMINING THAT THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD IN ITS CONSIDERATION OF RESPONDENTS' § 2 CLAIM.

In reversing and remanding the District Court's ruling on Respondents' § 2 claim, the Court of Appeals determined that the District Judge had applied an incorrect legal standard in determining that there was no voting rights violation. Although the Eleventh Circuit acknowledged that the standard to which it was bound in reviewing the lower court decision was that of the "clearly erroneous test" of F.R.Civ.P. 52(a), it found fault with almost every fact found by the District Court in its decision. The Court of Appeals' analysis reads, it is respectfully urged, as if it were judging the weight and credibility of the evidence rather than searching for clear error. As *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504, 1511-1512 (1985) said:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504, 1511-1512 (1985).

The Court of Appeals justified its revision of the facts by claiming to review them in light of *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Petitioners maintain that the District Court did correctly interpret the facts of this case in light of the 1982 Voting Rights Act amendments and the factors listed in the Senate Report. The Court did consider those factors and did, in essence, place its emphasis on those factors which *Gingles* later identified as being crucial. Based on the Court of Appeals' inappropriate revision of the facts and its failure to properly apply the "clearly erroneous" standard of review required by F.R.Civ.P. 52(a) with regard to Respondents' § 2 claim, this Court should grant the writ of certiorari.

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CONCLUSION

For all the above and foregoing reasons—in particular the rendering by the Eleventh Circuit of its decision in this case which is in conflict with the decision of the Second Circuit in the case of *Butts v. City of New York,* 779 F.2d 141 (2d Cir. 1985), and such departures from the accepted and usual course of judicial proceedings by the Eleventh Circuit so as to call for an exercise of this Court's power of supervision as shown above—Petitioners respectfully urge that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in order to review and correct errors of law made by that honorable Court. The application of the Voting Rights Act to the single-member office form of government involves an important question of federal law which has not been, but should be, settled by this Court, also justifying the issuance of the writ.

Respectfully submitted,

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APPENDIX

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Voter Education Project City of Carrollton, Marvin Walker, Robert Springer, James Wyatt and Jeff Long, Plaintiffs-Appellants,

v.

Tracey STALLINGS, Individually and in his official capacity as Mayor of the City of Carrollton, et al., Defendants,

Horrie Duncan, Individually and in his capacity as Carroll County Commissioner, et al., Defendants-Appellees.

Nos. 86-8405, 86-8661.

United States Court of Appeals,
Eleventh Circuit.

Oct. 19, 1987.

Appeal from the United States District Court for the Northern District of Georgia.

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This appeal involves a challenge to the single county commissioner form of government in Carroll County, Georgia, under the Voting Rights Act of 1965, as amended, and under the Constitution of the United States. The plaintiffs are appealing the district court's judgment for the defendants, based on its finding that the creation and continued

use of the single member Carroll County Commission does not violate Section 2 of the Voting Rights Act of 1965, as amended, nor does it deprive black persons in Carroll County of their § 1983 claims by violating their rights guaranteed by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.

I. STATEMENT OF THE CASE

The plaintiffs in this action are City of Carrollton Branch of the Voters Education Project (VEP), the City of Carrollton Branch of the National Association for the Advancement of Colored People (N.A.A.C.P.), and various individuals who are black citizens, residents and registered voters of Carroll County, Georgia.

The plaintiffs originally filed this action against the City of Carrollton, members of the Carrollton City Council, individually and in their official capacity, the Carroll County Commission and members of the Carroll County Election Board, seeking declaratory and injunctive relief under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and under Sections 2 and 5 of the Voting Rights Act of 1965, Title 42 U.S.C. § 1973, et seq. and § 1983.

The Section 5 claims were heard by a three-judge court convened under authority of 28 U.S.C. § 2284, which denied a temporary injunction by order entered November 20, 1984. By order entered January 17, 1985, defendants Horrie Duncan, individually and in his official capacity as Carroll County Commissioner, Patti Brown, A.G. Ault, Carol Martin, James Gamble and Tommy Greer, individually and in their official capacities as members of the

Carroll County Election Board, were severed from defendants Mayor and Council of the City of Carrollton. On October 16, 1985, the parties settled all claims against the city and a notice of dismissal was filed as to defendants Mayor and Council of the City of Carrollton. Thereafter, the case proceeded only as to the county defendants. Judgment was entered in their favor after trial by the court. Costs were assessed against the plaintiffs.[1]

A second issue relating to the defendants' award of costs in this lawsuit, is consolidated with this appeal.

II. FACTS

The plaintiffs alleged and sought to prove that the one person form of commission government in Carroll County resulted in the exclusion or dilution of black voting strength and lessened the opportunity of black persons in Carroll County to participate in the political process and to elect or have appointed to public office representatives of their choice. The facts, principally in the form of statistics and opinion evidence, will be discussed *infra*. The district court concluded that the plaintiffs failed to establish that there was a lack of ability of blacks to participate in the political process in Carroll County [the statutory claims] and failed to establish, by a preponderance of the evidence, that racial discrimination was a mo-

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1. Most notable and significant with respect to the issues of costs the plaintiffs contend that their settlement with the city defendants resulted in the creation of four single member districts and one at-large district. The plaintiffs contend that this settlement therefore conferred a direct benefit on the plaintiffs' class and, as a consequence, costs should not be awarded against them.

tivating factor for the present form of county government [the constitutional claims].

III. DISCUSSION

After the district court entered its judgment and opinion on April 29, 1986, the United States Supreme Court rendered its decision in *Thornburg v. Gingles*, the first Supreme Court interpretation of 1982 amendments to Section 2 of the Voting Rights Act of 1965.[2] The *Gingles* decision is important in many respects. We, therefore, measure the correctness of the trial court's decision in light of its holding. We note that the election procedure in *Gingles* required at-large voting for persons for a single district [multi-member district]. We consider the single-member county commission here to be in all essential respects comparable with the multi-member district discussed by the court in *Gingles*. It was the *at-large* election procedure in *Gingles* that commanded the court's attention.

First and foremost *Gingles* recognizes that both the language of the 1982 amendments to Section 2 of the Voting Rights Act and its legislative history establishes that "a violation could be proven by showing discriminatory effect alone," rather than discriminatory intent.[3] The

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2. *Thornburg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

3. 106 S.Ct. at 2759 (1986).

Section 2, as amended, reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which re-

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1982 amendments to the Act were a direct response by Congress to the Supreme Court's earlier plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which had established discriminatory intent as the standard for proving unconstitutional vote dilution under both the Fourteenth and Fifteenth Amendments.[4] Supporters of the Voting Rights Act had successfully urged Congress to amend the Act to provide statutory protection for minority vote dilution through a results test, which had been applied by the Supreme Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed. 2d 314 (1973) and by other federal courts before *Bolden*.

Second, *Gingles* not only followed the results test mandated by Congress, but also established a new three-part test for analyzing minority vote dilution claims under Sec-

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sults in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

4. 106 S.Ct. at 2759.

tion 2 of the Voting Rights Act.[5] Both parties in this appeal and the district court's opinion followed the totality of circumstances approach in applying the results tests as outlined by the Senate Judiciary Report accompanying the 1982 amendments to the Voting Rights Act.[6]

Although reliance on the Senate factors is still relevant in evaluating a minority vote dilution claim, the Supreme Court has said that "unless there is a *conjunction* of the following circumstances, the use of multi-member districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 2766.

The court then went on to state a new three-part test focusing on the existence of a politically cohesive geographically insular minority group and voting along racial

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5. 106 S.Ct. at 2766-67.

6. The Senate Report relies on the totality of circumstances approach as previously followed by the Supreme Court in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332 and by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (1973), *aff'd sub nom., East Carroll Parish School Board v. Marshall*, 425 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), prior to the Supreme Court's opinion in *Mobile v. Bolden*. Under that approach plaintiffs could prevail by showing that under the totality of circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. Under the results test, plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose. The Senate Report goes on to list the typical factors of the totality of circumstances approach to be considered in applying the results test. *See infra* at III (hereinafter the "Senate factors").

lines, as necessary preconditions for multi-member districts to operate to impair minority voter's ability to elect representatives of their choice. The court enunciated the following test.

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id.

The court's new three-part test establishes that racial bloc voting is the hallmark of a vote dilution claim. *Id.* at 2784-86; *see also Collins v. City of Norfolk*, 816 F.2d 932, 936-37 (4th Cir.1987), on remand from *Collins v. City of Norfolk*, — U.S. —, 106 S.Ct. 3326, 92 L.Ed.2d 733 (1986) (vacating *Collins v. City of Norfolk*, 768 F.2d 572 (4th Cir. 1985). The Court remanded the case for consideration in light of *Thornburg v. Gingles; Un. Latin Amer. Cit. v. Midland Ind. Sch. Dist.*, 812 F.2d 1494 (5th Cir. 1987) (*reh. granted*); *see generally*, comment, *Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution*, 36 CATH U.L. Rev. 537, 552 (1987).

Although the district court examined each of the factors listed by the Senate Judiciary Committee under the totality of circumstances approach in deciding in favor of the county defendants, the district court's opinion placed too much importance on those factors on which the Supreme Court has since given less importance.

Since the district court strictly followed the totality of circumstances approach and Senate factors without the benefit of the Supreme Court's analysis of those factors in *Gingles*, we must note where the district court committed errors in trying this case below. Before summarizing those errors, we first note the background of this lawsuit, and the relative positions of each party and the district court's treatment of those issues.

1. *Background and History*

Carroll County is located in the west central part of Georgia between the Atlanta area and Alabama. It consists of 495 square miles, and has a population according to the 1980 census, of 56,346 people. Of that figure, 9,679, or 17% are black, and 46,441, or 82% are white. There are 39,517 persons 18 years old or older in the county, and 6,051 or 15.3% are black. Black voters constitute a minority in the county. For the most part, the black population is concentrated in neighborhoods on the west side of the City of Carrollton.

Carroll County is governed by a single commissioner who is voted upon by voters of the entire county and serves a term of four years. 1983 Georgia Laws P. 4656.[7] A majority vote is required for the nomination and election of the county commissioner. Ga.Code § 21-2-501.

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7. The Carroll County Commissioner is the entire governing body for the county. The commissioner is vested with the powers, among other things: to direct, control and convey the county property; to abolish wards, to establish election precincts and militia districts according to law, to select and appoint all minor offices of the county, whose election or appointment is not otherwise fixed by law. 1983 Georgia laws, 4656 at 4660.

This single commission form of county government in Carroll County was established by Georgia law, 1951, p. 3310 and has been in existence since January 1, 1953. It was continued by Ga.L. 1983, p. 46556. However, prior to 1951, a three-member board of commissioners governed Carroll County between the years 1945-1952.

Throughout the history of Carroll County, various legislative acts were enacted altering the structure of its government. In 1885, Ga. Act No. 173, created a five-member commissioner government in Carroll County. In 1894, Act No. 10 repealed the Act of September 1885 creating a five-member commission and conferred on the ordinary of the county the powers of commissioner. In 1903, the legislature passed Act No. 466, which created a five-member commission. In 1908, Act No. 511 was enacted creating the office of commissioner of roads and revenues for Carroll County, a single-member commission. Thereafter, the County had a single-member commission government until 1945, when it was changed again to a three-member commission. That was the system in effect when the legislature changed it to a single commissioner in 1951.

In 1947, a bill was introduced in the legislature by Representative Willis Smith of Carroll County to re-establish a one-person commission of Carroll County. This bill was subject to a referendum of voters of the county. The referendum apparently failed, because Representatives Smith and Duncan in 1951 introduced a bill, H.B. 534, having the same effect without a referendum. This bill passed and became effective on January 1, 1953. This bill was supported by the unanimous vote of the two Carroll

County representatives and the senator for the district of which Carroll County was a part.

Evidence introduced at the trial quotes Representative Smith as saying in a speech favoring the passage of the white primary bill, which was pending before the 1947 legislature at the term during which Smith introduced the 1947 bill: "Georgia is in trouble with the Negroes unless the bill is passed. This is a white man's country and we must keep it that way."

No black person has run successfully for the office of commissioner throughout the history of Carroll County. Although the district court found there has been a history of discrimination in the State of Georgia which has had an adverse impact upon blacks in Carroll County, the court also found that there was *no evidence* that the change in the form of government from a three-man board of commissioners to a single-member, was *enacted* or is being maintained with an intention to discriminate against minorities or of diluting minority voting rights. The court incorrectly noted that the 1951 Act establishing the sole commissioner was introduced by Senator William Trotter of Troup County, Georgia. The court held that no opposition to the change was expressed by any organization or individual.

2. *The Constitutional Challenge*

As noted above, the trial court stated that there was *no* evidence that the change in the form of government was *enacted* with an intention to discriminate against minorities. The court apparently based this conclusion on the testimony of witness William P. Trotter, who had

been the state senator from the senatorial district which was comprised of Carroll, Troup, and Haralson counties. Trotter was a resident of LaGrange which is in Troup County. The court misconstrued Trotter's testimony, which was: "I okayed the passage of it [the one-person commission bill] through the senate after it had passed the House." The trial court stated: "The bill was introduced by Senator Trotter of Troup County, Georgia." The Senate Journal shows that the bill was introduced in the House of Representatives by Representatives Smith and Duncan and it had passed the House before being voted on by the Senate, Journal of the Senate, Monday, Feb. 12, p. 471 (1951).

The significance of this fact is that Trotter's testimony at the trial that he had no racial purpose in mind was unimportant, because he was not the person who introduced or sponsored the bill. Instead, it was introduced and sponsored by the two representatives from Carroll County, one of whom was Willis Smith. This is of special significance because, as appears from the 1947 House Journal, Smith had introduced the same bill in 1947 at the session of the legislature during which he made the speech quoted above favoring the white primary bill.[8]

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8. The white primary bill was a bill which was introduced in the Georgia General Assembly sponsored by Governor Talmadge for the ostensible purpose of avoiding the problems created for those attempting to maintain white supremacy through the white Democratic party by the Supreme Court decision in 1944 in *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987. In that case, the Supreme Court had held in effect, that the fact that the state legislature by statute controlled many of the activities of the Democratic pary in Texas, this had the effect of converting into state action the activities of the Democratic party in excluding blacks from

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We conclude that the speech made by the sponsor of the 1947 single-commissioner act for Carroll County, which act he later sponsored in 1951, was evidence of an intent to discriminate against black voters in any voting legislation before the General Assembly during that session, and that a finder of fact might well infer that such intent continued until 1951 when the bill was re-introduced under the same sponsorship. *See* in this connection, Parker, *The Results Test of the Voting Rights Act,* 69 Va.L.Rev. 715, 741 (In the absence of a "smoking gun" victims of discriminating voting laws must resort to circumstantial evidence, inferences, suspicions and likelihood of discriminatory intent.)

We conclude, therefore, that there was evidence that the trial court should have considered in deciding whether

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voting. The white primary bill in Georgia undertook to repeal all of the prior acts of the legislature which controlled the holding of elections or the holding of conventions by political parties. In doing this, it repealed all laws against ballot box stuffing, voting more than once, and delivery by printers of ballots to those other than qualified election officials. It also repealed laws protecting ballots after elections and protecting registration lists. Under the bill, registration lists would be left entirely in the hands of the county Democratic committees. Thus, the election laws in Georgia would permit the white Democratic party, which was the only party holding elections in Georgia at the time, to operate entirely without state supervision. The white primary law passed the legislature in 1947, but was later vetoed by Governor Thompson when he assumed office under a decision by the Georgia Supreme Court, which held him to be the winner of the election of that year.

there was an unconstitutional motiviation in the mind of the introducer of the bill.[9]

3. *The Statutory Challenge*

As both *Gingles* and the 1982 amendment to the Voting Rights Act to make clear, proof that a contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters, is not required under Section 2 of the Voting Rights Act. Notwithstanding a constitutional challenge to the single-member commission in Carroll County, subsection 2(b) of the Voting Rights Act establishes that § 2 has been violated

> where the "totality of the circumstances" reveal that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973, as amended, 96 Stat. 134 Sub. Sec. 2(b); *Gingles* 106 S.Ct. at 2763. Thus, the plaintiffs may prevail by showing that as a result of the challenged practices or structure, they have less opportunity than other voters in Carroll County to participate in the political process and to elect candidates of their choice.

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9. It is particularly significant to note that in considering the motivation of the sponsor of a bill in the Georgia legislature, we take judicial notice of the existence of the custom at that time that no local legislation would be enacted by the state legislature without the approval of all of the members of the local delegation. The court considered the testimony of Senator Trotter on motivation.

Congress has determined that whether a particular electoral structure or practice impacts on minority electoral opportunities, is determined on an objective basis based on a number of factors. The Senate Report which accompanied the 1982 amendments to the Voting Rights Act listed seven "typical factors that were probative of a § 2 violation." These factors were originally derived from the Supreme Court's opinion in *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). These factors, which the district court also relied on in trying the case below and are central to this appeal are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority groups to register to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state of political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals; and

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Two additional factors listed in the Senate Report as having probative value are:

1. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
2. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S.Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.Code Cong. & Ad. News 177, 206-07.

In listing these factors in its opinion, the district court correctly noted that:

> Both the Senate Report and the *Zimmer* case explicitly state that there is no requirement that the plaintiffs prove that all or even a majority of these factors are present. Rather, . . . "courts are to consider the existence of these factors . . . in the aggregate, or as the language of Section 2 states, based upon the totality of circumstances."

Citing *Collins v. City of Norfolk, Va.*, 605 F.Supp. 377, 381 (E.D.Va.1984), *aff'd*, 768 F.2d 572 (4th Cir.1985).[10]

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10. The case which the district court cites, *Collins v. City of Norfolk, Va.*, 605 F.Supp. 377, 381 (E.D.Va.1984), *aff'd*, 768 F.2d 572 (4th Cir.1985), was reversed and remanded by the Supreme Court in light of *Thornhill v. Gingles*. *See, e.g., Collins v. City of Norfolk*, — U.S. —, 106 S.Ct. 3326, 92 L.Ed.2d 733 (1986).

The district court further stated that the "most important of these factors is the presence of racially polarized voting, (Senate Factor No. 20)," and that this circuit has stated that the "existence of racially polarized voting is the keystone of a vote dilution case." Citing *United States v. Marengo County Com'n.*, 731 F.2d 1546, 1566 (11th Cir. 1984), *cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984).

Nonetheless, the district court concluded that:

> After considering all the evidence in the case, the plaintiffs have not sufficiently demonstrated the existence of racially polarized voting. Even if the court was to assume the existence of racial bloc voting, after examining the other senate factors, plaintiffs still do not prevail on their voting rights claim. There is no credible evidence that senate factors Nos. 3, 4, 6 and additional factor No. 2 impact upon this case.

The district court then went on to list its findings with respect to the other senate factors.

As will be shown herein, the district court misconstrued the theory of racial polarized voting as it relates to a claim of vote dilution and applied the incorrect legal standard in determining there was no Voting Rights Act violation.[11]

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11. In *Gingles*, Justice Brennan wrote a five part opinion, four parts of which were joined by a majority of the court. The majority opinion established that racial bloc voting was a key element in proving vote dilution and also established a new three part test for analyzing vote dilution claims. The majority opinion also provided a definition of racially polarized voting and outlined a standard for legally significant racial bloc voting. Part III.C of Justice Brennan's opinion joined

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First, we note that the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of ultimate findings of vote dilution. In *Gingles*, the Supreme Court reaffirmed its view that the clearly erroneous test of Rule 52(a) is the appropriate standard for appellate review of vote dilution. However, the clearly erroneous standard does not prevent the court for correcting findings of fact based on misconceptions of the law. The Court stated:

> The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standards of review. As we explained in *Bose*, Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.

Id. 106 S.Ct. at 2782.

The essence of a Section 2 claim as characterized by the court in *Gingles*, is that certain electoral characteristics interact with social and historical conditions to create

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only by Justices Marshall, Blackmun and Stevens, delineated the standard of statistical evidence necessary to determine racially polarized voting. Thus, there was only a plurality of the court on the evidentiary standard to prove racial bloc voting. There were also three concurrences; Justice White filed a concurring opinion; Justice O'Connor filed an opinion concurring in the judgment, in which Chief Justice Burger, Justice Powell and Justice Rehnquist joined and Justice Stevens wrote an opinion concurring in part and dissenting in part, which was joined by Justice Marshall and Justice Blackmun.

an inequality in the minority and majority voters' ability to elect their preferred representatives. *Id.* at 2764-65. The theoretical basis of this impairment exists, according to the Court,

> where minority and majority voter consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choicese of minority voters. The crucial factor in showing that the majority will defeat the choices of the minority voting is racial polarized voting.

Id.

Although adherence to the Senate factors may still be relevant to a claim of vote dilution, the court in *Gingles* carefully developed the proposition that to prove a Section 2 violation "a bloc voting majority must usually be able to defeat candidates supported by a political cohesive, geographically, insular minority group." *Id.* at 2766.

In footnote 15 of the Court's opinion, the Court underscored the significance of racial bloc voting and minority electoral success and enunciated what it believed effectuated the true intent to Congress in listing the Senate factors accompanying the 1982 amendment. The Court stated:

> Under a "functional view of the political process mandated by § 2, S.Rep. 30, n. 120, the most important Senate Report factors bearing on § 2 challenges to multimember districts are '*extent to which minority group members have been elected to public office in the jurisdiction*' and the '*extent to which voting in the election of the state or political subdivision is racially polarized.*' If present, the other factors, such as the lingering effects of past discrimination, the use of appeals to racial bias in election campaign, and the

> use of electoral devices which enhance the dilutive effects of multimember districts when substantial white bloc voting exists—for example antiballot voting laws and majority vote requirements, *are supportive of, but not essential to a minority voters claim.*" In recognizing that some Senate Report factors are more important to multimember dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability to "elect" . . . .

Id. (emphasis added.) The Court then goes on further to say: "By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they can be afforded relief." *Id.* at n. 15.

It is therefore clear at the outset, that although the district court followed the totality of circumstances approach as then applied in lower courts in *Zimmer* and *Collins v. City of Norfolk*, the court, nonetheless, applied the incorrect standard in adjudging the legal significance of racial bloc voting and its relation to the other Senate factors. Under *Gingles*, the district court was incorrect when it held that even assuming racial polarization was found, the plaintiffs could not prevail because the other Senate factors were not proven. *Gingles* makes it clear that the other Senate factors are supportive of, but not essential to, a minority voter's claim. The *Gingles* decision is essentially a "gloss" on the Senate factors and a limitation on the interpretation of those factors in proving a vote dilution claim. *See, e.g., Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir.1987).

On remand, the district court must make the proper inquiry under the factors which the Supreme Court has said are most important: "(1) the extent to which minority group members have been elected to public office in the jurisdiction; and (2) the extent to which voting in the election of the state or political subdivision is racially polarized."

(A) *The District Court's Finding as to Racially Polarized Voting*

Having established that the court erred in applying the totality of circumstances aproach, as since interpreted by the Supreme Court in *Gingles*, we next address the district court's specific findings as to racially polarized voting and the other Senate factors bearing on vote dilution.

In its order ruling in favor of the county defendants, the district court stated: "After considering all the facts presented in this case, the court concludes that the plaintiffs have not sufficiently demonstrated the existence of racially polarized voting." The district court based its ruling on the failure of the plaintiff's expert witness, Dr. Michael Binford, to examine certain county and municipal elections in his statistical analysis of vote returns in determining the existence of racially polarized voting.

At trial, the plaintiffs atempted to prove the existence of racially polarized voting through the statistical analysis of vote returns conducted by their expert witness, Dr. Binford. Dr. Binford examined evidence of racially polarized voting based on statistical analysis of voting returns, registration returns and the examination of three election races in which black candidates ran for election for county-wide offices in Carroll County. These elections were Jeff Long's race for county commissioner in 1976, and Narva Farris's

races for sheriff of Carroll County in 1980 and 1984. In addition to the three county-wide elections, Dr. Binford also analyzed the election results from each precinct in the 1984 presidential elections where the Reverend Jesse Jackson ran as a presidential candidate in the Democratic party primary.

Dr. Binford's conclusions, based on a correlation method to measure polarization in voting, found there was a strong correlation between the registration characteristics of the precincts and the percentage of votes that each candidate received in the elections which he examined. This analysis, in statistical terms, is called an R2 coefficient, which correlates the percentage of a particular racial group registered in a given precinct, with the percentage of the precinct votes for a minority candidate. *See, e.g., N.A.A.C.P. v. Gadsden County School Board,* 691 F.2d 978, 983 (11th Cir. 1984). Dr. Binford found there were strong correlations; .75, .78 and .86 in each of the county races respectively, and .91 in the precincts where the Reverend Jesse Jackson ran as a candidate. Based on these findings, Dr. Binford testified there was a substantial degree of racially polarized voting in Carroll County.

However, the district court cast doubt on the validity of Dr. Binford's analysis. The court stated that:

> Dr. Binford did not analyze Robert Benham's race for the Georgia Court of Appeals in 1984, nor did he analyze any of the city of Carrollton elections or other community elections in Carroll County in which a black candidate ran successfully.
>
> Dr. Binford did not analyze the elections when Mr. Farris ran on a county ticket. Failure to analyze all of the available data, casts doubt on the ultimate conclusions of the expert.

The district court further noted that there was no testimony concerning the issue of "white backlash" or whether whites have ever attempted to limit the field of candidates or hinder any black candidacy. The court concluded that the evidence did not sufficiently indicate that race was an overriding or primary consideration in the election of a candidate.

The appellees also attacked the validity of Dr. Binford's analysis, on the basis that he used 1979 registration figures by race to compare 1976 election returns and that he failed to take into account the results of Judge Robert Benham's election in 1984 and other municipal and county elections where blacks ran on a ticket.

The district court's finding as to the nonexistence of racial bloc voting, is crucial to the appellants' Section 2 claim. As *Gingles* makes clear, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles* 106 S.Ct. at 2766.

The district court's treatment of racial polarized voting must also be analyzed in light of the standard for determining legally significant racial bloc voting as set out by the Court in *Gingles*.

In *Gingles*, the Court stated that while the extent of bloc voting necessary to demonstrate that minority voting is impaired would vary from district to district, there were some general principles relative to bloc voting which the court then proceeded to pronounce. According to the Court, the purpose of inquiring into the existence of racially polarized voting is two-fold:

> to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc *usually* to defeat the minority's preferred candidates. See supra at —. Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices.

Id. at 2769 (emphasis added).

Next, the Court gave an indication as to how those voting practices could constitute legally significant bloc voting. Minority bloc voting, under Section 2, can be established by showing that a significant number of minority group members usually vote for the same candidates; and, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes, rises to the level of legally significant white bloc voting. *Id.* at 2770. Moreover, the court said that the amount of bloc voting that will minimize or cancel out black voting strength will vary from district to district, according to a number of factors, such as the nature of the alleged dilutive electoral mechanism, other dilutive devices such as majority vote requirements, designated posts, size of the district, percentage of registered voters and the number of candidates in the field. *Id.*

Additionally, the court noted that racial bloc voting is more probative of a claim that a district experiences legally significant polarized voting, if a pattern of bloc voting is shown over a period of time, rather than the results of a single election. In this regard, the court stated:

> "[T]he fact that racially polarized voting is not present in one or a few individual elections does not

> necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove the district did not experience polarized voting in that election; special circumstances, such as the absence of an apparent incumbency, or the utilization of bullet voting, may explain minority electoral sucess in a polarized contest."

Id. Finally, the court noted that because the degree of racial bloc voting that is cognizable as an element of a § 2 voting dilution claim would vary from case to case, the court declined to announce any single doctrinal test to determine the degree of legally significant racial bloc voting.

However, what is at least clear from the court's opinion, is that racial bloc voting does not depend on the sucess or defeat of a particular candidate. Under Section 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate that is important. *Id.* at 2776.[12] The court stated:

> In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote

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12. Only a plurality of the court agreed with Justice Brennan's analysis here in Part III C of his opinion; it was joined only by Justices Marshall, Blackmun, and Stevens. It held that causation was irrelevant to a Section 2 inquiry and that the race of the voter not the candidate, is the primary determination of voter behavior. Justice Brennan wrote that both the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate per se is irrelevant to racial bloc voting analysis. *Id.* at 2773-75. The plurality also rejected the suggestion that racially polarized voting refers only to white bloc voting which is caused by white voters' racial hostility toward black candidates. *Id.* at 2777.

> dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent.

Id. at 2779.

With this legal framework for determining the existence of racially polarized voting and its interplay with a politically cohesive, geographically insular minority group, the district court's finding regarding the lack of racially polarized voting must be re-examined. At the outset, it is clear that contrary to the district court's conclusion, the plaintiffs established their case of racially polarized voting, by a preponderance of the evidence, through the clearly acceptable means of a bivariate regression analysis and the testimony of lay witnesses. Although no one statistical theory is appropriate for all vote dilution cases, the Eleventh Circuit has approved the form of statistical analysis used by the plaintiffs in this case. *See, e.g., N.A.A.C.P. v. Gadsden County School Board,* 691 F.2d 978, 983 (11th Cir.1984). *Cf., Lee County Branch of the N.A.A.C.P. v. City of Opelika,* 748 F.2d 1473, 1482 (11th Cir.1984). (Court cautioned against placing too much reliance on R2 coefficients in ruling on the issue or racially polarizing voting), *McCord v. City of Fort Lauderdale,* 787 F.2d 1528 (11th Cir.1986).

Moreover, the form of regression analysis used by Dr. Binford was also approved by the plurality in *Gingles.*[13]

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13. There, the Court also adopted the lower court's definition of racial polarization to describe the correlation shown by

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Here, the district court erred when it ruled that the plaintiffs' statistical proof was lacking because the plaintiffs' expert witness did not examine election returns for municipal elections in Carrollton and the Carroll County voting returns of the statewide re-election of Judge Benham of the Georgia Court of Appeals.

The reliance on other elections here is clearly misplaced. Since the city of Carrollton as the city defendant was severed from this lawsuit as a result of a settlement of the parties, it can hardly be said that the plaintiffs' evidence failed because they did not analyze Carrollton city elections. The voting rights statute is violated if a protected class has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The inquiry here is the Carroll County singular commission form of government, not the City of Carrollton nor any other municipality for that matter. The plaintiffs are alleging that the one person form of county government in Carroll County, and by its very nature, elected on an at-large basis, dilutes their voting strength and their ability to elect a political candidate of their choice. Thus, it is the ability of minority voters to elect candidates of their choice to political office on a county wide basis, which is important here and of

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the regression analysis. (Racial polarization exists where there is a "consistent relationship between the race of the voter and the way in which the voter votes.") *Gingles*, 106 S.Ct. at 2768, n. 21. Commentators suggest that the plurality has repudiated the earlier line of reasoning first adopted by the Fifth Circuit in *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir.), *reh. denied*, 730 F.2d 233 (1984), and later expanded in *Opelika*, which rejected the use of bivariate analysis. *See generally, Comment, supra*, at 556 n. 190.

vital concern under the Voting Rights Act. The plaintiffs' evidence, in this regard, showing a racial correlation of voting in three races in which blacks ran for office county wide, has been unrefuted. The defendants did not offer any rebuttal evidence of any kind. Moreover, as a plurality of justices of the Supreme Court have held, it is the race of the voter, not of the candidate, which is of concern in racial polarization claims.

Additionally, the district court concluded that the statistical evidence of vote dilution was insufficient because Judge Benham's race was not examined. First, we must point out, as the Supreme Court said in *Gingles,* "special circumstances, such as the absence of an opponent, incumbency, . . . may explain minority success in a polarized contest." *Id.* 106 S.Ct. at 2770. Judge Benham, an incumbent black Judge on the Court of Appeals, ran for re-election to the court throughout the State of Georgia, as did other Court of Appeals Judges. He received 45% of the vote in Carroll County, not a majority, as he did in the state at-large. Moreover, at trial, the plaintiffs' counsel asked Dr. Binford, their expert witness, whether the lack of knowledge that Judge Benham was a black man may have affected the election results in the race. Dr. Binford testified, however, that he had no way of measuring that.

There are many factors which could explain minority success in a particular election, as the Supreme Court has said, and certainly the lack of knowledge that an incumbent judge is black, is one of those factors. But, as a plurality of the Court has said, "both the language of § 2 and a functional understanding of the phenomenon of

vote dilution, mandate the conclusion that the race of the candidate per se is irrelevant to racial bloc voting analysis." *Id.* at 2775.

The district court further found that the plaintiffs had failed to examine the race when Mr. Farris, a black, ran on a county ticket. However, an examination of the record shows that the plaintiffs did examine the races when Mr. Farris ran for Sheriff of Carroll County in 1980 and 1984, where he received 14.7% and 15.4% of the votes cast respectively. The only apparent reference to the county races which the district court spoke of must be the contests for sheriff in 1972 and 1976, when Mr. Farris was listed as a *deputy* on an election ticket in which white candidates ran for sheriff. Mr. Farris did not run for election as a deputy sheriff; he was appointed by virtue of his relation to the ticket.[14] The notion that the plaintiffs' statistical evidence of racially polarized voting must fail because of the failure to analyze the election contests when Mr. Farris assisted a white candidate for sheriff get elected, misconstrues the theory of vote dilution. It is the access of minority voters to the political process, not the majority's access to the black vote, which is the chief concern of Section 2 of the Voting Rights Act.

Thus, we hold that there is substantial evidence in the record to indicate that Carroll County experiences racially polarized voting in county-wide eletcions. There was also non-expert testimony that racial polarization of the vote

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14. In 1972, Mr. Farris was appointed as a deputy as a result of the election of W.J. Robinson, whom Farris had supported. In 1976, Farris supported D.A. Jackson for sheriff, who lost. Farris was therefore not reappointed as deputy sheriff.

existed in Carroll County. On remand, the district court need not re-examine evidence as to the third prong of the Supreme Court's test for minority vote dilution in *Gingles* —whether the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the black candidate. The district court's finding that a preponderance of evidence did not show racially polarized voting in county-wide elections in Carroll County is clearly erroneous for the reasons as set forth in this opinion. Moreover, the district court's definitional use of the concept of white backlash as indicative of racially polarized voting is also misplaced in light of the Court's opinion in *Gingles*.

(B) *Minority Electoral Success*

We now turn to the next Senate factor of major concern to the Court in *Gingles;* the extent to which minority group members have been elected to public office in the jurisdiction.

The extent of minority electoral success in the jurisdiction, is the second most important factor identified by the Court in *Gingles* to § 2 challenges to multi-member districts. *Gingles* at 2766 n. 15. In *Gingles,* the Court reversed part of the district panel decision that had found a § 2 violation in North Carolina House District 23 (Durham). There, the court held that the fact that blacks in House District 23, who constituted 36 percent of the population and had elected one black to a three member House delegation in six elections since 1973, thereby enjoying proportional representation, mandated judgment for the defendants.

A similar finding, however, cannot be made for Carroll County. First, no black candidate has ever been elected commissioner of Carroll County under its single member commission system, nor did a black candidate serve on the Carroll County Commission during its years as a three member commission, between the years 1945 and 1951. In other words, no black has ever been elected Commissioner of Carroll County. However, the district court noted that black persons have been appointed to various county boards and commissions in Carroll County, apparently as evidence of minority electoral success in the jurisdiction. The district court stated that blacks were appointed to the "Election Board, Water Authority Board, Department of Family and Children Services, the Public Health Board, the Hospital Board Authority and the West Georgia Regional Library." Most of these appointments were made, according to the court, by Tracy Teal, the County Commissioner.

However, despite these various appointments, no black has ever been *elected* to *any* county office in Carroll County. There is simply no minority electoral success on the county level to measure at all. While appointments to boards and commissions may be evidence of the willingness of some whites to allow some black participation in the political process, it does not demonstrate the ability of blacks to get elected to political office in Carroll County.

Second, the extent to which minority candidates have been elected to office *in the jurisdiction*, obviously must be measured by elections in the political jurisdiction in question, in this case Carroll County. The district court pointed as evidence of minority success, to the election of

a black to the city council in Carrollton, and the city councils of Villa Rica and Temple, the election of a black mayor of the city of Whitesburg and the election of a black to the Carrollton School Board.

However, the plaintiffs contend that the election of a black to the Carrollton City Council, was a direct result of the initiation of the lawsuit against the Carrollton City Council and its then existing at-large election system. The appellants also contend that few black appointments to boards and commissions existed before the filing of this lawsuit. They contend that a black was not elected to the Carrollton City Council until the council changed from a multi-member at-large system to a four single member district system. Prior to this change, they argue, blacks had run unsuccessfully for the city council.

In *Gingles*, the Supreme Court noted that the Senate report to the 1982 amendments expressly states that, "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of black vote" and that "the possibility exists that the majority citizens might evade § 2 by manipulating the election of a safe minority candidate". *Gingles* at 2779. The Court further noted that the Senate report "requires an independent consideration of the record" and a "searching practical evaluation of the past and present reality." *Id.* According to the Court, the language of Section 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not preclude a § 2 claim. *Id.* at 2780.

In the instant case, proof that the election of a minority candidate to political office occurred after initiation of a

lawsuit could be a factor mitigating against a finding of increased minority electoral success. As the former fifth circuit stated in *Zimmer v. McKeithen* 485 F.2d 1297, 1307, (C.A.5 1973), "such success, might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds", 485 F.2d at 1307.

In any case, there is no "sustained minority electoral success" approximating the level of representation which the Supreme Court spoke of in *Gingles*, as evidence of the ability of black voters to elect representatives of their choice in Carroll County. In this case, there has been hardly any minority representation at all. The district court's reliance on municipal elections in Carroll County as proof of minority electoral success of a county electoral scheme is obviously misplaced. The political jurisdiction in question here is the county, not the cities of Villa Rica, Whitesburg, or Carrollton.

The record plainly demonstrates the clear lack of minority electoral success in Carroll County.

(C) *Other Senate Factors*

Applying the totality of circumstance approach, the district court made specific findings of fact as to other Senate factors bearing on vote dilution. Although these factors are supportive of, but not essential to a minority voter claim, contrary to the district court's findings, proof of these factors is not required to show a vote dilution claim. We, nonetheless, briefly describe the district court's findings as to the other Senate factors.

The district court ruled that the parties agreed that there was no slating process in Carroll County (Senate factor no. 4) and further ruled that the evidence does not support the conclusion that the structure of Carroll County's election system adversely affects minority interests (factor no. 3) or that county campaigns have been characterized by racial appeals (factor no. 6). The court concluded that the policy underlying Carroll County's single-member at-large Commission is not tenuous. (Additional factor no. 2). The court noted that although responsiveness is of limited importance under Section 2, it nonetheless ruled that the evidence did not establish there was any racial effect involved in the alleged unresponsiveness (additional factor no. 1). The court noted that a history of official discrimination did exist in Carroll County but that the plaintiffs failed to establish there was a lack of ability of blacks to participate in the political process (factor no. 1).

Although there still remain economic disparities between blacks and whites (factor no. 5), the court ruled that the defendants had sufficiently carried their burden in disproving any casual connection between economic disparities and reduced political participation by minorities. While stating that there did not appear to be any lack of educational opportunities, the court noted that there were still social and economic disparities between blacks and whites in Carroll County, although these disparities had decreased. The court ruled that any continuing disparities did not depress the level of black participation in Carroll County politics. The court further ruled that black citizens of Carroll County currently register, vote, and run for office without any impediments. While noting that there

was room for improvement, the court stated that "the county had made acceptable efforts in the present as well as the past to increase minority registration and that past discriminatory practices do not presently hinder blacks from registering and voting in Carroll County elections". The court found that the voter registration facilities were dispersed throughout the county and were available to all citizens equally without regard to race. The district court concluded, based on a number of circumstances, that the black population in Carroll County has an equal opportunity to participate in the political process.

We, however, take exception to the district court's analysis of certain Senate factors. First, the district court concluded that the defendants had carried their burden in disproving any casual nexus between social and economic disparities and the lack of access to the political access. The court said that there did not appear to be a lack of educational opportunities. However, the proper concern here is what effect discrimination in education has had on the level of black participation in the political process. Undoubtedly, a low level of black registration may well be indicative of a depressed level of participation in the political process, caused by a number of factors, including discrimination in education. Moreover, the district court recognized that the lack of black teachers in Carroll County school system was a factor bearing on unresponsiveness, and that this had caused the court deep concern, but, the court nonetheless ruled that the plaintiffs did not prove what steps defendants should have undertaken to increase the number of qualified black teachers. We do not understand that the plaintiffs must carry as part of their burden, establishing what measures the county should have taken

to correct alleged unresponsiveness by school administrators.

As to the district court's finding regarding black voter registration, the appellants contend that new registration sites were established in the black community only after the lawsuit was filed, despite difficulties in black registration which had long existed. The appellants contend that the location of voter registration at the County Court House, intimidated blacks who desired to register to vote.

The record reflects, according to the 1980 census, that blacks constituted only 9% of the registered voters of the county, while they were 15.3% of the voting age population. In 1984, the percentages of black registered voters increased to 10.8%. Yet, the evidence remains that blacks are still under registered in Carroll County which may impact on their ability to participate in the political process. Low black registration is highly probative, but not dispositive of lack of black electoral participation. However, we cannot conclude that the district disregarded this fact in concluding there was no lack of access to the political process.

Finally, a finding by the district court that the structure of Carroll County's election system did not adversely affect minorities, must be re-examined in light of the Court's opinion in *Gingles*. The district court found that this 495 square mile, majority vote, at-large district did not adversely affect the ability of minorities to participate in the political process. The Supreme Court has found that electoral mechanisms such as unusually large geographical boundaries, at-large elections, and majority vote requirements often operate in a discriminatory fashion to deny

the minority's access to the political system. *See, e.g., White v. Regester,* 412 U.S. 755, 766, 93 S.Ct. 2332, 2339-40, 37 L.Ed.2d 314 (1973) (majority vote requirements); *Rogers v. Lodge* 458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982) (unusually large geographic district, and a majority vote requirements that was found to submerge the will of the minority and to deny the minority's access to the system.)

Although we have difficulty with the district court's findings, we cannot say that they are clearly erroneous as a matter of law.

However, we point out, that *Gingles* commands the trial court's attention to the Senate factors which are deemed most important to a vote election claim; the extent of minority electoral success and polarized voting. The other senate factors are a "gloss" on a vote dilution claim, but not their essence. *See Collins v. City of Norfolk, supra.*

(D) *Application of the Gingles Test*

After reviewing the propriety of the district court's ruling in relation to the Senate factors, we must now discuss that ruling in light of the new three part test established by the Supreme Court in *Gingles* for proof of vote dilution cases.

The district court's ruling on racial polarized voting, which we have already discussed, addresses the third prong of the *Gingles* test—the degree of racially polarized voting. However, the first and second parts of the test, which are equally important, must be addressed by the parties and the court. *Gingles* requires, as an initial threshold showing: first, that the minority group must be able

to demonstrate that the multi-member district is sufficiently large and the minority is sufficiently compact to be able to constitute a majority in a single member district; and second, the minority group must be able to show that it is politically cohesive. *Gingles* 106 S.Ct. at 2766. These two factors, in addition to racial polarized voting, are necessary preconditions for multi-member districts to operate to impair minority voting strength.

In a footnote, the court stressed the relative importance of showing, as a threshold matter, that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district:

> Unless, the minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. . . . Thus, if the minority group is spread evenly through a multimember district, or if, although geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single member district, these minority members cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral scheme.

Id. at 2766 n. 17. In this sense, the court is stressing the importance of the concentration of minority voters as a group, and their political cohesiveness, whose electoral choices at the polls are defeated by the at-large voting scheme.

In the trial below, the district court disallowed the plaintiffs' proffers of evidence relating to the geographic concentration of voters by race in proposed three member and five member forms of commission government in Car-

roll County. The district court sustained the defendants objections to plaintiff's exhibits 84, 85, 86, 87 on relevancy grounds. The demographic evidence proffered by plaintiffs is highly relevant to a showing under *Gingles* whether black voters in Carroll County are sufficiently numerous and compact to constitute a majority in a single member district, if single member districts were created out of the one county district. In this case, it is the at-large nature of the districting scheme which is alleged to operate in the same fashion, as multi-member districts in diluting black voting strength. Clearly, the district court erred in disallowing such evidence under the Supreme Court's approach in *Gingles*. On remand, such evidence should be admitted on the question of the geographic concentration of the voters by race.

Second, the plaintiffs must establish in addition to geographic compactness that the minority group is politically cohesive. If the minority group is not politically cohesive, then it cannot be said that the present scheme thwarts minority voting interests.

Although such political cohesiveness may indeed exist in Carroll County, there has been no specific finding as now required by *Gingles*. On remand, the parties should have an opportunity to present evidence of the political cohesiveness of black voters in Carroll County or the lack thereof.[15]

IV. CONCLUSION

In sum, we REVERSE and REMAND the judgment of the district court for consideration in light of the Su-

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15. The proof of racial polarization may, of course, be found sufficient by this Court to make the necessary finding of cohesiveness.

preme Court's opinion in *Gingles* and our interpretation of that decision as it relates to the case at hand.

We also REVERSE the district court's finding that there was no evidence of a constitutional violation in the original adoption of the County Commissioner system of government. The evidence in the record and our judicial notice of the sponsor of the 1951 bill, raises an inference of an unconstitutional motive in the mind of the introducer of the bill.

The judgment for costs is VACATED and REMANDED for further consideration by the trial court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT, CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG	)	
V.	)	CIVIL ACTION
TRACEY STALLINGS, individually and in his official capacity as MAYOR OF THE CITY OF CARROLLTON; N.T. LANXTON, ROGER ROSSOMONDO, AL COLLINS and J. CARL WILLIAMSON, JR., individually and in their official capacities as members of the CARROLLTON CITY COUNCIL; HORRIE DUNCAN, individually and in his official capacity as COMMISSIONER OF CARROLL COUNTY, GEORGIA; PATTI BROWN, A.G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in their official capacities as members of the CARROLL COUNTY ELECTION BOARD	)	NO. C84-122N (Filed April 29, 1986)

ORDER

The above-styled matter was filed by plaintiffs in August 1984, seeking declaratory and injunctive relief under the First, Thirteenth, Fourteenth, and Fifteenth

Amendments to the Constitution of the United States, and under Section 2 and 5 of theVoting Rights Act of 1965, Title 42 U.S.C. § 1973 *et. seq.* and § 1983.

The Section 5 claims were heard by a three-judge court conveyed under authority of 28 U.S.C. § 2284 and decided by Order entered November 20, 1984, denying plaintiff's motion for a temporary injunction. By Order entered January 17, 1985, defendants Horrie Duncan, individually and in his official capacity as Carroll County Commissioner, Patti Brown, A.G. Ault, Carol Martin, James Gamble and Tommy Greer, individually and in their official capacities as members of the Carroll County Election Board, were severed from defendants Mayor and Council of the City of Carrollton. On October 16, 1985, the parties settled all claims against the City and the plaintiffs filed a Notice of Dismissal as to defendants Mayor and Council of the City of Carrollton. Accordingly, this case proceeds only as to the county defendants.

The action came on for trial before the court without a jury on February 4-10, 1986. This order constitutes the court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

FINDINGS OF FACT

1.

The plaintiffs in this action are black citizens, residents, and registered voters of Carroll County, Georgia.

2.

Carroll County is located in the west central part of Georgia between the Atlanta metropolitan area and Ala-

bama. It consists of 495 square miles, and has a poulation according to the 1980 census of 56,346. The percentage of black persons in the population is 17%. There are seven municipalities in the county, the largest of which is the City of Carrollton, having a population of 14,078, 28% of which are black persons. According to the 1980 census there are 39,517 persons 18 years old or older in the county, 6,051 or 15.3% are black.

3.

Carroll County is governed by a single commissioner. This form of government was established by Georgia Laws 1951, page 3310 and is presently constituted under Georgia Laws 1983, page 4656. The Commissioner's term of office is for four years. The Commissioner is elected at-large by majority vote.

4.

Horrie Duncan was the County Commissioner from 1968 to 1984. Tracy Teal has held this position since January 1, 1985.

5.

Prior to 1951, a three-man Board of Commissioners governed Carroll County. The 1951 Act establishing the sole commissioner form of government was introduced by Senator William Trotter of Troup County, Georgia. No opposition to the change in 1951 was expressed by any organization or individual. There is no evidence that the change in the form of government was enacted or is being maintained with an intention to discriminate against minorities or of diluting minority voting rights.

6.

There has been a history of discrimination in the state of Georgia and in Carroll County which has had an adverse impact upon blacks in Carroll County.

7.

Dr. Michael Binford testified as to some of the voting characteristics of the residents of Carroll County and on the extent of racially polarized voting in Carroll County. Dr. Binford's qualifications appear to be in political science. The court is not aware of any experience in statistics.

Dr. Binford spent approximately 10 or 11 pre-trial hours in formulating his opinions regarding Carroll County's voting patterns. He did not visit Carroll County. Dr. Binford reviewed Mr. Jeff Long's race for County Commissioner in 1976; Mr. Narva Farris' races for Sheriff in 1980 and 1984 and Rev. Jesse Jackson's race for President in 1984. In each of these races the black candidate was unsuccessful. Dr. Binford concluded that racially polarized voting exists in Carroll County.

Dr. Binford did not analyze Judge Robert Benham's race for the Georgia Court of Appeals in 1984. Nor did he analyze any of the City of Carrollton elections or other communities' elections in Carroll County in which a black candidate ran successfully. Dr. Binford did not analyze the election when Mr. Farris ran on a county ticket. Failure to analyze all the readily available data casts doubts on the ultimate conclusion of the expert.

8.

In the 1984 county-wide elections, Rev. Jackson received 5.4% of the vote, Mr. Farris received 15.4% of the vote, and Judge Benham received 43.4% of the vote. Each of these candidates is black.

9.

There was no testimony concerning the issue of "white backlash" or whether whites have ever attempted to limit the field of candidates or hinder any black candidacy. The court finds that the plaintiffs have not sufficiently demonstrated by a preponderance of the evidence that voting in Carroll County is racially polarized. The evidence does not sufficiently indicate that race is an overriding or primary consideration in the election of a candidate.

10.

A majority vote is required in order to be elected County Commissioner. There is no candidate slating process or anti-single shot provision.

Although Dr. Willingham, another of plaintiff's experts, contended that the size of the county makes it difficult for a minority to campaign, none of the plaintiffs who had campaigned for office had any difficulty in traveling or campaigning throughout the county because of Carroll County's size. Further, there was no testimony from any of the black candidates that they encountered any problems from the white community while campaigning or that they were in any way impolitely treated. The only testimony of any problems involved a single incident mentioned

by Mr. Long that five or six of his campaign signs had been taken down in one neighborhood. Mr. Long also testified that it was not uncommon for other candidates, regardless of their race, to have campaign posters removed by opposition workers. Mr. Long posted approximately 70 to 80 campaign posters that election. The plaintiffs have not sufficiently demonstrated that the structure of Carroll County's election system has hindered black participation in the electoral system.

11.

There is no evidence in the record that overt or subtle racial appeals have characterized any election within the last decade in Carroll County. The plaintiffs have not proven that race was made an issue during any campaign discussed at the trial, or that race was ever an overriding or primary consideration in county elections.

12.

The evidence indicates that blacks in Carroll County are economically disadvantaged as compared to whites. According to the 1980 census statistics, there are a total of 14,909 families in Carroll County, 2,047 are black. At the time of the census the median income of white families was $17,118 compared to $11,168 for black families. Approximately 9% of the white families in Carroll County have incomes under the poverty level; approximately 30% of the black families are under the poverty level. Black families and individuals are more likely to live in substandard housing and less likely to have a high school diploma.

13.

There was a great deal of testimony regarding the educational system in Carroll County. The evidence indicates that an integrated education is now equally available to all persons in Carroll County. Blacks who comprise a minority in most of the county and city schools have been selected by the student bodies as captain of football teams, homecoming queens, etc. and are an integral part of both educational systems.

14.

Although there was some referral in the testimony to discrimination in the criminal justice system in Carroll County, the evidence offered by the plaintiffs was vague and non-specific. Plaintiffs did not offer any statistical evidence of disparate sentencing in Carroll County. The generalizations by the witnesses concerning disparate sentences is not enough to establish such.

15.

The 1980 census figures for Carroll County show that 15.68% of the local government workers are black, and that in the area of public administration, 14% are black. No evidence was introduced that county hiring is affected by discriminatory practices.

16.

The Carroll County Election Board is in charge of the electoral system in Carroll County. The Board was created in 1974 by the Georgia General Assembly, Georgia Laws 1974, page 3556, amended by Georgia Laws 1982, page 5040. *See* O.C.G.A. § 21-2-70 *et. seq.* Since its inception, a

black person has served on this five person board. L. S. Molette served on the Board until April 1, 1975. Defendant James Gamble was appointed April 1, 1975 and is still serving in the Board. Both these men are black.

17.

According to Dr. Binford's calculations, in 1980 about 9% of the registered voters were black and in 1984 approximately 10.8% were black. Voting registration is carried out by a Board of Registrars. The Chief Registrar is James Crawford, a white man. There was testimony by some of the plaintiffs that blacks were reluctant to travel to the Carroll County Courthouse to register. However, there are currently several voter registration facilities in Carroll County including city halls and banks in all the small towns. One of these registration facilities is located in the Thomas Homes Community which has one of the largest concentrations of black population in the county. There have been several voter registration drives in the black community.

The plaintiffs testified only as to one isolated example of a black person who might not have been permitted to register and the testimony was so speculative as not to support any conclusion that a black person was denied the right to register or vote. The plaintiffs unanimously testified that Mr. Crawford was helpful and made diligent efforts to see that every eligible person in Carroll County was registered.

Voter registration is a matter of continuous concern with room for improvement. Nevertheless, the court finds that the County has made acceptable efforts in the pre-

sent as well as the past to increase minority registration and that past discriminatory practices do not presently hinder blacks from registering and voting in Carroll County elections. The court finds that voter registration facilities are currently dispersed throughout the county and are available to all citizens equally without regard to race, and that provisions are made to facilitate the registration of blacks. The court finds that there is no evidence to indicate that within the last decade any black was discouraged, prevented, or intimidated from registering or voting in an election.

18.

No black has ever been elected Commissioner of Carroll County. Black persons have been appointed to county boards and commissions in addition to those on the Election Board. Mr. Raymond Byrd served on the County Water Authority Board; Clois Reese serves on the Department of Family and Children's Services Board; Steve Adams is a member of the Public Health Board; Dr. Charles Wilson is on the Hospital Board Authority; and Leroy Childs has been the Director of West Georgia Regional Library for several years. All of these persons are black. Most of these appointments have occurred since Tracy Teal was elected County Commissioner. The Court notes that the Commissioner's power to appoint individuals on boards and departments is limited by state and local law.

Black persons have been elected to local positions within the county. Ms. Ann Sheppard, a black woman, ran at large for the Carrollton City Council in 1983 and received approximately 45% of the vote. She was elected to

the City Board in 1985. In 1983, Mr. Joshua Mabrey, a black man, was elected to the City of Carrollton School Board, defeating Mr. Dan Chance, a white man. Mr. Robert Gamble, a black man, has been elected Mayor of the City of Whitesburg in Carroll County. Mr. Doyle McCain has been elected to the City Council of Villa Rica in Carroll County, and Mr. William Simmons to the City Council of Temple in Carroll County. Both these individuals are black.

19.

Mr. Long and Mr. Marvin Walker, the President of the City of Carrollton Branch of the National Association for the Advancement of Colored People, testified that white candidates sought their support for their campaigns. Numerous political figures have sought Mr. Walker's endorsement.

Mr. Tracy Teal stated that black support was important for his victory in the 1984 Commissioner race.

20.

There was considerable testimony about the lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. There was no testimony, however, that Mr. Duncan or Mr. Teal ever refused to listen to or to meet with members of the black community about their concerns. The court also notes that the new Commissioner is apparently very concerned with the opinions and needs of the black community and that Mr. Teal's attitude suggests his genuine interest in being fair and responsive to all segments of Carroll County.

21.

There were two particular areas of alleged unresponsiveness that were highlighted by plaintiffs. The first involved certain unpaved county roads. There are slightly less than 1,300 miles of road in Carroll County, of which 458 miles remain unpaved. The plaintiffs testified that they had repeatedly attempted to get two or three roads paved during Mr. Duncan's administration. Old Carrollton Road was the road most often mentioned. It is approximately four miles long and whites as well as blacks reside along it.

The policy on paving roads in Carroll County is not clear to the court. The testimony that the unpaved areas are predominately centered in black communities creates some concern, but in the court's opinion does not appear to rise to the level of discrimination suggested by the plaintiffs. The evidence suggests that the failure to pave roads was a result of fiscal restraint rather than of any racial bias.

The court concludes that compared to the overall mileage of county roads and the overall mileage of unpaved roads, the fact that three or four roads are unpaved does not justify the conclusion that any unresponsiveness by the Commissioner's office in this area is racially motivated.

22.

The other area of alleged unresponsiveness is the lack of black teachers. The evidence showed that blacks are significantly underrepresented in the teaching profession in Carroll County. The number of black teachers has

dropped from the period when schools were segregated. This dearth has caused the court deep concern. The defendants' evidence seems to offer sufficient explanation about the difficulties in recruiting black teachers, who enjoy a high demand in most school systems, especially considering the fact that there are higher paying and more attractive positions in nearby metropolitan school districts. The court was favorably impressed by the attitude of the Superintendent of Schools in the City of Carrollton, Mr. Thomas Upchurch's, desire to improve the recruiting process and to be fair to blacks.

While the blacks who testified all complained about the lack of black teachers, the plaintiffs totally failed to show what steps defendants have failed to undertake which would have proven successful in securing a greater number of qualified black teachers.

The court finds that the County has attempted to respond to the minority concerns in this area, although this is a critical area requiring continued close scrutiny in the future.

23.

The plaintiffs argue that the policy underlying the single-member-at-large commissioner system is tenuous.

Defendants respond that the present system is more efficient, less expensive, decision making as well as accountability is centralized, that the sole commissioner better represents all the people of Carroll County rather than a particular segment of the community, and that the sole commissioner is more accessible. Regardless of whether there may be equal or better reasons for a multi-member system, this in no way diminishes the perceived values of

the single-member system. The court finds that there are sound logical reasons for the present form of government.

24.

On March 13, 1984, concurrent with the presidential primary, a non-binding referendum was held on the question of "should Carroll County change from a one man to a multi-member commission? Yes/No." A majority of the voters voted "No."

25.

Finally, Dr. Alex Willingham testified that despite active participation by blacks, a black could never be politically successful in Carroll County. This conclusion, Dr. Willingham testified, was a product of a week long study which he conducted in Carroll County. His "study" consisted of interviewing approximately 15 people about the nature of racial politics in Carroll County; the vast majority of these individuals were plaintiffs or testified for plaintiffs in this lawsuit. Of the fifteen people, only one was white and that was Ms. Nellie Duke. Dr. Willingham admitted that it was important to his methodology to interview white candidates who also lost county-wide elections, but that he did not do so. Dr. Willingham's testimony revealed a complete lack of a scholarly or scientific approach. The only reasonable conclusion the court can make is that this witness undertook his study with preconceived fixed opinions and made no attempt to make objective findings.

CONCLUSIONS OF LAW

The court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1343, 2201, 2202 and 42 U.S.C. § 1973j(f).

Plaintiffs at trial raise two distinct legal challenges to the electoral system of Carroll County. Plaintiffs seek relief under various constitutional provisions and under Section 2 of the Voting Rights Act. The court recognizes that it should decide this case on a statutory basis if possible. *New York Transit Authority v. Beazer,* 440 U.S. 568, 582 n.22, 99 S. Ct. 1355, 1364 n.22 (1979); *Lee County Branch of NAACP v. City of Opelika,* 748 F.2d 1473, 1478 (11th Cir. 1984). Should the court determine that the plaintiffs have failed to prove a violation of Section 2, the court will then consider whether the plaintiffs have proven that their constitutional rights have been violated.

A. *Statutory Challenge under Voting Rights Act*

Plaintiffs are challenging a single-member at-large system. Although not *per se* violative of Section 2, *see Collins v. City of Norfolk,* 768 F.2d 572, 575 (4th Cir. 1985), at-large election systems have been held unconstitutional in certain situations.

Section 2 of the Voting Rights Act prohibits electoral practices and procedures which produce discriminatory results although the practices and procedures were not installed or maintained with an intent to discriminate. 42 U.S.C. § 1973. The burden of proof of a Section 2 violation rests upon plaintiffs to produce evidence demonstrating that the political processes are not equally open to participation by the group in question. *Id., White v. Regester,* 412 U.S. 755, 766, 93 S. Ct. 2332, 2339 (1973).

Plaintiffs may establish a violation of Section 2 through a variety of objective factors listed in the Senate Report when this section was amended. These factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07.

Two additional factors listed in the Senate Report as having probative value are:

1. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

> 2. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. See also Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S. Ct. 1083 (1975) (per curiam) (articulating similar factors to be considered).

Both the Senate Report and the *Zimmer* case explicitly state that there is no requirement that the plaintiffs prove that all or even a majority of these factors are present. S. Rep., *supra; Zimmer,* 485 F.2d at 1305. Rather, as has been recognized, "courts are to consider the existence of these factors in the *Zimmer* court's terms in the 'aggregate,' or as the language of Section 2 states, based upon the 'totality of circumstances.'" *Collins v. City of Norfolk, Va.,* 605 F. Supp. 377, 381 (E.D. Va. 1984), *aff'd* 768 F.2d 572 (4th Cir. 1985).

The most important of these factors is the presence of racially polarized voting (Senate factor No. 2). The Eleventh Circuit has stated that the existence of racially polarized voting is "the keystone of a [vote] dilution case." *United States v. Marengo County Com'n.,* 731 F.2d 1546, 1566 (11th Cir. 1984), *cert. denied* 105 S. Ct. 375 (1984). While that court indicated that it did not hold that a dilution claim could never be made out in the absence of racially polarized voting, the significance of this factor is obvious as "in the absence of racially polarized voting, black candidates could not be denied office because they were black." *Id.* citing *Nevett v. Sides,* 571 F.2d 209, 223 n.16 (5th Cir. 1978), *cert. denied* 446 U.S. 951 (1980).

After considering all the facts presented in this case, the court concludes that plaintiffs have not sufficiently demonstrated the existence of racially polarized voting. Nevertheless, even if the court was to assume the existence of racial bloc voting, after examining the other Senate factors, plaintiffs still do not prevail on their Voting Rights Act claim.

There is no credible evidence that Senate factors Nos. 3, 4, 6 and additional factor No. 2 impact upon this case. The parties agree that no slating process occurs in Carroll County (factor No. 4), and the evidence does not support the conclusion that the structure of Carroll County's election system (factor No. 3) adversely affects minorities or that county campaigns have been characterized by racial appeals (factor No. 6). The court concludes that the policy underlying Carroll County's single-member at-large commissioner is not tenuous (additional factor No. 2). The results test does not require that political subdivisions necessarily abandon the perceived benefits of their electoral system. *Marengo*, 731 F.2d at 1560 n.24.

The plaintiffs assert a lack of responsiveness on the part of elected officials to the particularized needs of the black community (additional factor No. 1). However, responsiveness is of limited importance under Section 2. *Id.* at 1565, 1572. In any event, the evidence does not establish that there was any racial effect involved in the alleged unresponsiveness.

Factor No. 1, a history of official discrimination, does exist. A history of discrimination is important evidence of both discriminatory intent and discriminatory results. *Id.* at 1567. The court reviews this factor closely as under the results test

> past discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process. Past discrimination may cause blacks to register or vote in lower numbers than whites. Past discrimination may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs.

Id. See also Zimmer, 485 F.2d at 1305-06. Nevertheless, the existence of past discrimination in such areas as registration, voting, and political participation is ultimately significant only if it can be shown to have lingering effects on the ability of blacks to participate in the democratic process today. *Collins*, 605 F. Supp. at 402.

The plaintiffs have not established a lack of ability of blacks to participate effectively in the political processes of Carroll County.

There still remain economic disparities between blacks and whites (factor no. 5). Inequality of access is an *inference* which flows from the existence of economic and educational inequalities. *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 (5th Cir. 1977) (en banc) *cert. denied* 434 U.S. 968 (1977). The *burden* is not on the plaintiffs to prove than any disadvantage is causing reduced political participation, but rather is on defendants to disprove a casual nexus. *Marengo*, 731 F.2d at 1569. The defendants have sufficiently carried their burden. There do not appear to be any disparities in educational opportunities. The socio-economic disparities between blacks and whites have gradually decreased. More importantly, the evidence indicates that any continuing disparities does not presently depress the level of black participation in Carroll County politics.

Black citizens of Carroll County currently register, vote and run for office without any impediments. Black voter registration has substantially increased in the last decade and the County has made extensive efforts to increase voter registration and to make the registration process more accessible. While no black person has been elected County Commissioner, the only time a black has campaigned for the office was in 1976. Several black persons have been elected or appointed to city and county positions (factor No. 7), although this fact, in and of itself, is not decisive. *Valasquez v. City of Abilene, Texas*, 725 F.2d 1017, 1022 n.1 (5th Cir. 1984).

The Supreme Court has consistently rejected the view that any group has a constitutional right to proportional political representation. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 156-57, 91 S. Ct. 1858, 1875-76 (1971). Section 2 is not designed to guarantee that minorities are elected to positions they seek or that every segment of the community is entitled to someone to represent their views. Rather, the Voting Rights Act asks whether there is an equal right to participate in the political process. *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss. 1984), *aff'd sub nom Miss. Republican Executive Comm. v. Brooks*, 105 S. Ct. 416 (1984). Although only comprising approximately 15% of the voting population, the evidence indicates, and the court concludes as a mater of law, that the black population has this opportunity in Carroll County. Blacks have equal access to the ballot box. Black persons have run for various political offices in the county and its municipalities and some have been elected. Blacks campaign in white areas and whites campaign in the black. There are a number of influential black leaders in Carroll

County; politicians of both races seek their support and endorsements. The black minority has unquestionably had a proportionally greater impact upon politics in Carroll County than their numbers above would suggest. After considering the totality of the circumstances, plaintiffs have not sufficiently established a Voting Rights violation.

B. Statutory Claims under § 1983

The court concludes that the plaintiffs have failed to show that any citizen has been deprived of his or her right to vote on account of his or her race as a result of Carroll County's electoral system. Blacks are not prevented from registering to vote or from actually voting. Additionally, for the reasons set forth in the court's opinion on the Voting Rights Act and constitutional claims, plaintiffs' § 1983 claim must fail.

C. Constitutional Claims

Because the court cannot resolve this case in plaintiffs' favor on the statutory claims, it must now address the constitutional challenges to the single-member at-large system. Plaintiffs allege constitutional deprivations under the first, thirteenth, fourteenth and fifteenth amendments.

As regards the first and thirteenth amendments, there has been no evidence offered and the court concludes as a matter of law that defendants have not violated plaintiffs' first or thirteenth amendment rights.

The standard applicable to fifteenth amendment claims is presently unclear. *Jones v. City of Lubbock*, 727 F.2d 364, 370 (5th Cir. 1984). *See also, Rogers v. Lodge*,

458 U.S. at 613, 619 n.6, 102 S. Ct. 3272, 3276, n.6 (1982). In *City of Mobile v. Bolden*, 446 U.S. 55, 61-65, 100 S. Ct. 1490, 1496-98 (1980) a plurality of the Supreme Court Justices suggested that the fifteenth amendment proscribed only direct interference with registration and voting. No direct interference has been shown. Recent Eleventh Circuit cases maintain that it remains an open question whether the fifteenth amendment covers vote dilution cases. *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1541 n.11 (11th Cir. 1984); *Marengo*, 731 F.2d at 1555. The parties appear to operate under the assumption that the fifteenth amendment does proscribe vote dilution, and that the analysis used is the same as for the fourteenth amendment. *See Nevett v. Sides*, 571 F.2d at 220. Accordingly, all conclusions the court makes concerning plaintiffs' fourteenth amendment challenge will also be considered applicable to their fifteenth amendment claims.

The parties agree that in *City of Mobile v. Bolden, supra*, the United States Supreme Court established that in order for plaintiffs to prevail on their fourteenth amendment constitutional claims they are required to show proof of a racially discriminatory intent in the creation or maintenance of the challenged election system. *See also Dallas County Com'n.*, 739 F.2d at 1541; *Chapman v. Nicholson*, 579 F. Supp. 1504, 1507 (N.D. Ala. 1984). The plaintiffs presented no direct evidence that the sole-member at-large commissioner system was adopted for a discriminatory purpose. Discriminatory intent may be "inferred from the totality of the relevant facts." *Rogers v. Lodge*, 458 U.S. at 618, 102 S. Ct. at 3276. Proof of discriminatory intent necessary to sustain a constitutional claim may also be demonstrated through objective factors. *Id.* The

plaintiffs urge the court to infer from a newspaper article and other pieces of legislation that the proponents of the at-large system had discriminatory motives. The court, though, concludes that after analyzing all the aggregate facts including all the *Zimmer* factors, the plaintiffs have failed to establish by a preponderance of the evidence that "racial discrimination was [or is] a motivating factor" for the present system. *Dallas County*, 739 F.2d at 1541.

In conclusion, the court finds for the defendants on all claims and the clerk is directed to enter judgment accordingly.

SO ORDERED, this 29 day of April, 1986.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JUDGMENT IN A CIVIL CASE

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT, et, al,

V.

TRACEY STALLINGS, et, al,

CASE NUMBER C-84-122-N

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant's TRACEY STALLINGS, individually and in his official capacity as MAYOR OF THE CITY OF CARROLLTON; N. T. LANXTON, ROGER ROSSOMONDO, AL COLLINS and J. CARL WILLIAMSON, JR., individually and in there official capacities as members of the CARROLLTON CITY COUNCIL; HORRIE DUNCAN, individually and in his official capacity as COMMISSIONER OF CARROLL COUNTY, GEORGIA. PATTI BROWN, A. G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in there official capacities as members of the CARROLL COUNTY ELECTION BOARD recover of the Plaintiff's

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT, CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG there costs of action.

Date: April 30, 1986

Luther D. Thomas, Clerk
/s/ Sid Griffith
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT, CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG	)	
V.	)	CIVIL ACTION NO. C84-122N
HORRIE DUNCAN, individually and in his official capacity as CARROLL COUNTY COMMISSIONER; PATTI BROWN, A. G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually, and in their official capacities as members of the CARROLL COUNTY ELECTION BOARD	)	(Filed Aug. 8, 1986)

ORDER

On April 30, 1986, the court entered judgment for the defendants in the above-styled voting rights action. The matter is presently before the court on plaintiffs' motion to review the taxing of costs. The plaintiffs' initially request that the court, in its discretion, disallow any costs be taxed against the plaintiffs. The plaintiffs' position is insufficient to justify a deviation in the normal taxation of costs; therefore, the court declines to do so and turns to plaintiffs' specific objections to defendants' costs.

Plaintiffs contend that defendants should not be reimbursed for the cost of the partial trial transcript of the testimony of Dr. Melvin Steely. Dr. Steely was listed as a possible expert witness for the defendants. Plaintiffs called Dr. Steely for testimony during the presentation of their case. The trial transcript was necessary for defendants' trial strategy to determine whether Dr. Steely should be re-called during the defendants' case. Such a cost will be allowed.

Next, plaintiffs argue that the taxing of costs for certain copies of documents and papers should be disallowed. Defendants agree that copies of case law are not taxable and voluntarily reduce the amount requested for this item by $524.85. Generally, the cost of copying will be considered by this court to be a cost of doing business and not recoverable unless necessary for use in the case. After examining defendants' remaining items of copies, it does appear that many were necessary for the case. However, there also appears that there might be some duplication and inflation in some of the cost figures. The court reduces the defendants' request by an additional $150.00.

Finally, plaintiffs object to the taxing of costs of certain depositions. There does not appear to be any objection that these depositions were unnecessary, improperly taken or unduly prolonged. Further these depositions were taken at the request of the plaintiffs not the defendants. Said cost will be allowed.

Plaintiffs' motion is hereby denied, except that $674.85 will be reduced from defendants' requested costs.

SO ORDERED, this 6 day of August, 1986.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.	)	CIVIL ACTION NO. C84-122N
V.	)	(Filed Nov. 20, 1984)
TRACEY STALLINGS, et al.	)	

ORDER

This voting rights action is currently before the court on plaintiffs' motion for a temporary injunction alleging that Ga. Laws 1983, p. 4656, providing for the office of the Carroll County Commissioner, was enacted without preclearance as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The only claim implicating Section 5 is the $180.00 increase in qualification fee, however, the qualification fee for the office of County Commissioner is set by state law, O.C.G.A. § 21-2-131, which, along with subsequent amendments thereto, has been precleared. No other claim of plaintiffs' based on Ga. Laws 1983, p. 4656 involves Section 5. Accordingly, plaintiffs' motion for a temporary injunction is denied.

SO ORDERED, this 19 day of November, 1984.

/s/ James C. Hill
JAMES C. HILL
JUDGE, ELEVENTH CIRCUIT
COURT OF APPEALS

/s/ Harold L. Murphy
HAROLD L. MURPHY
JUDGE, UNITED STATES
DISTRICT COURT

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.	)	CIVIL ACTION NO. C84-122N
V.	)	(Filed Jan. 17, 1985)
TRACEY STALLINGS, et al.	)	

ORDER

The above-styled matter is presently before the court on defendants' motions to sever and withdraw as counsel of record. Defendant moves to sever the county defendants individually and in their respective official capacities as Commissioner of Carroll County and members of the Carroll County Election Board from the city defendants. Plaintiffs did not respond to defendants' motion and pursuant to new Local Rule 220-1(b), the motion is deemed unopposed. Plaintiffs are suing Carroll County and the City of Carrollton for alleged violations of the voting rights act, 42 U.S.C. § 1973, in each unit of governments' electoral practices. Carroll County is a separate legal entity from the City of Carrollton and elections for positions in county and city government are controlled by different acts of the General Assembly of Georgia. Neither city nor county defendants have any discretion, authority or control over elections held for the other. As there are separate and distinct issues involved and the continued joinder of all defendants together could result in prejudice,

inconvenience and confusion to all parties, defendants' motion to sever is granted. Accordingly, the court orders that defendants Horrie Duncan, Patty Brown, A. G. Ault, Carol Martin, James Gamble and Tommy Greer be severed from the remainder of the defendants.

J. Eugene Beckham, Jr.'s motion to withdraw as counsel of record for defendants Patty Brown, A. G. Ault, Carol Martin, James Gamble and Tommy Greer is also unopposed. It appearing to the court that the requirements of Local Rule 110-5 have been complied with and that defendants will be henceforth represented by Richard G. Tisinger of Tisinger, Tisinger, Vance & Greer, the motion is granted.

SO ORDERED, this 11 day of January, 1985.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
JUDGE, UNITED STATES
DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Filed October 22, 1986)

No. 86-8405 & 86-8661

CITY OF CARROLLTON BRANCH OF THE NATIONAL ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG,

Plaintiffs-Appellants,

versus

TRACEY STALLINGS, Individually and in his official capacity as Mayor of the City of Carrollton, et al.,

Defendants,

HORRIE DUNCAN, Individually and in his capacity as Carroll County Commissioner, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

O R D E R :

Appellants' motion to consolidate appeal 86-8405 with appeal 86-8661 is GRANTED.

/s/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; VOTER EDUCATION PROJECT CITY OF CARROLLTON; MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG, Plaintiffs, v. TRACEY STALLINGS, individually and in his official capacity as Mayor of the City of Carrollton; N. T. LANXTON, ROGER ROSSOMONDO, AL COLLINS and J. CARL WILLIAMSON, JR., individually and in their official capacities as members of the Carrollton City Council; HORRIE DUNCAN, individually and in his official capacity as Carroll County Commissioner; PATTI BROWN, A.G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in their official capacities as members of the Carroll County Election Board, Defendants.	CIVIL ACTION FILE NO. C84-122N (Filed Dec. 3, 1987)

ORDER

The above-styled Defendants' motion to stay proceedings in the District Court having come before me, and the same having been read and considered.

IT IS THEREFOR CONSIDERED, ORDERED AND ADJUDGED that said motion be and the same hereby is granted, and proceedings in this Court in the above-styled matter are hereby stayed pending further order of this Court.

SO ORDERED this 3 day of Dec., 1987.

/s/ G. Ernest Tidwell
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-8405 & 86-8661

D.C. Docket No. 84-122

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG,

Plaintiffs-Appellants,

versus

TRACEY STALLINGS, Individually and in his official capacity as Mayor of the City of Carrollton, et al.,

Defendants,

HORRIE DUNCAN, Individually and in his capacity as Carroll County Commissioner, et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Georgia

---

Before HATCHETT and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

J U D G M E N T

These causes came on to be heard on the transcript of the record from the United States District Court for the

Northern District of Georgia, and were argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same are hereby, REVERSED; and that these causes be and the same are hereby, REMANDED to said District Court for further proceedings; and that the judgment of the District Court for costs is hereby, VACATED and REMANDED to said District Court for further consideration by the trial court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 19, 1987
For the Court: Miguel J. Cortez, Clerk
By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: DEC 3 1987

(2)

No. 87-1186

In The

Supreme Court of the United States

October Term, 1987

HORRIE DUNCAN, individually and in his official capacity as CARROLL COUNTY COMMISSIONER; PATTI BROWN, A. G. AULT, CAROL MARTIN, JAMES GAMBLE and TOMMY GREER, individually and in their official capacities as members of the CARROLL COUNTY ELECTION BOARD,

Petitioners,

v.

CITY OF CARROLLTON BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOTER EDUCATION PROJECT CITY OF CARROLLTON, MARVIN WALKER, ROBERT SPRINGER, JAMES WYATT and JEFF LONG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

WAYNE B. KENDALL
Counsel of Record
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QUESTIONS PRESENTED FOR REVIEW

(1) Whether there is a conflict between the opinion below, 829 F.2d 1547 (11th Cir. 1987), and the opinion of the Court of Appeals for the Second Circuit in *Butts v. City of New York,* 779 F.2d 141 (2d Cir. 1985) as to the application of the Voting Rights Act, 42 U.S.C. Sec. 1973, to single-member electoral offices?

(2) Whether the Eleventh Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings, in deciding the case below, as to call for an exercise of this Court's power of supervision?

(3) Whether the Eleventh Circuit Court of Appeals has decided an important issue of federal law which has not been, but should be, decided by this Court?

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STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Courts Below

This action was originally filed on August 13, 1984, in the United States District Court for the Northern District of Georgia to require the City of Carrollton and Carroll County to abandon its at-large system for the election of the City Council and its sole commissioner form of government for the County Commission (R1-1). The complaint alleged that these election schemes not only had resulted in the inability of minorities to get elected to the Carrollton City Council or the Carroll County Commission, but had excluded or diluated black voting strength and had effectively denied black persons in Carroll County and the City of Carrollton equal access to the political process. This deprivation had thereby violated the provisions of the First, Thirteenth, Fourteenth and Fifteen Amendments of the Constitution of the United States and Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C., Secs. 1973 and 1983 (R1-1).

The Section 5 claims were heard by a three-judge court convened under authority of 28 U.S.C. 2284 which denied a temporary injunction by Order entered November 20, 1984 (R1-22). By Order entered January 17, 1985, Petitioners, Horrie Duncan, individually, and in his official capacity as Carroll County Commissioner; Patti Brown, A.G. Ault, Carol Martin, James Gamble and Tommy Greer, individually, and in their official capacities as members of the Carroll County Election Board, were

severed from defendants Mayor and Council of the City of Carrollton (R2-27). On October 16, 1985, the parties settled all claims against the City and a Notice of Dismissal was filed as to defendants Mayor and Council of the City of Carrollton (R3-71). Thereafter, the case proceeded only as to the County defendants.

The District Court conducted a nonjury trial on February 4-10, 1986. On April 29, 1986, the court issued an Order constituting the court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 52(a) (R4-99). The court found for the Petitioners on all claims, concluding that, by a preponderance of the evidence, it had not been established that "racial discrimination was [or is] a motivating factor for the present system." (R4-99-24). Respondents thereupon filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals.

On May 30, 1986, the Petitioners submitted a Bill of Costs to the District Court (R1-1-1). On June 16, 1986, Respondents moved to review the taxing of the costs and filed a brief in support of their motion (R1-2-1; R1-3-1). Petitioners' response to Respondents' brief was filed on July 3, 1986 (R1-7-1), and Respondents filed a supplemental brief on July 16, 1986 (R1-8-1). On August 8, 1986, the District Court entered an order denying the Respondents' motion to review costs but reduced the total bill by $674.85 (R1-9-1.2). Respondents filed a Notice of Appeal on that decision on August 27, 1986 (R1-10). The appeal of the District Court's decision on the merits and its decision on Petitioners' request to tax costs against

Respondents was consolidated by Order of the Eleventh Circuit Court of Appeals on October 22, 1986.

Thereafter, the case was orally argued and a decision was rendered by the Eleventh Circuit Court of Appeals on October 19, 1987, reversing the decision by the District Court and remanding the case for further fact finding.

B. Statement of Facts Relevant to Issues Presented for Review on Certiorari

According to the 1980 census, Carroll County has a population of 56,346. Of this population, 9,679, or 17%, are black and 46,441 or 82%, are white (R5-100, 109, R6-146). There are 39,517 persons 18 years old or older in the county, 6,051 or 15.3% are black (R5-100). It can be inferred that black people constitute a minority of registered voters in Carroll County.

For the most part, the black population is concentrated in neighborhoods on the west side of the City of Carrollton (R6-80). Appellants are individual black adult citizens of the City of Carrollton and Carroll County and are representatives of two associations also named as Plaintiffs; the City of Carrollton Branch of the Voter Education Project (hereinafter VEP) and the City of Carrollton Branch of the National Association For the Advancement of Colored People (hereinafter N.A.A.C.P.) (R1-1-2).

Carroll County is governed by a single commissioner who is voted upon at-large by the voters of the entire county and serves for a term of four years. 1983 Georgia Laws 4656. A majority vote is required for the nomination and election of the County Commissioner. Ga. Code

Sec. 21-2-501 (1983). Prior to 1951, a three-man board of commissioners governed Carroll County. 1943 Georgia Laws 844.

The Carroll County Commissioner has and is vested with the exclusive jurisdiction and control over the following, among other things: to direct, control, convey, and care for all the property of the county according to law, to establish, alter, and abolish public roads, private roads, private ways, bridges and ferries according to law, to establish, abolish, or change election precincts and militia districts according to law, and to select and appoint all minor offices of the county whose election or appointment is not otherwise fixed by law. The County Commissioner also, and most importantly, is the sole legislative authority in the County and as such can pass county ordinances on his own motion. 1983 Georgia Laws 4656 at 4660.

Throughout the history of Carroll County, no black or minority candidate has run for County Commissioner successfully. The only black candidate who ran lost in 1976 (R5-179, R6-4). Although blacks have been elected to local office in the City of Carrollton and have recently been appointed to local boards and commissions, qualified black candidates who have sought election on a county-wide basis have been unsuccessful (R6-173-77, 187).

At the trial of the case, evidence of racially polarized voting in Carroll County was established by the Respondents' expert witness, Dr. Michael Binford, through the statistical analysis of vote returns. Dr. Binford testified that his analysis was based upon the record evidence consisting of a collection of voting returns, registration returns, and the examination of three election races involv-

ing black candidates; Jeff Long's race for County Commissioner in 1976; Narva Farris' race for sheriff in 1980; and Narva Farris' race for sheriff in 1984 (R5-88-89, 91, 111-113). Dr. Binford's conclusions, based on a correlation method of measuring polorization in voting, found that there were strong correlations, .75, .78, and .86, in each of the three races respectively (R5-90, 120-121). In addition, using the ecological regression method, Dr. Binford concluded that Mr. Long and Mr. Farris would receive a very low percentage of votes in an all white precinct and would receive a very substantial percentage of votes in an all black precinct (R5-90).

Dr. Binford also testified at trial concerning his statistical calculations of the R and R^2 coefficients, and the findings he obtained as a result of his analysis of each of the three races identified above (R5-93-98, 118-122). Based upon his analysis of these races, Dr. Binford testified that there was "a substantial degree of racially polarized vote." (R5-122).

In addition to the three county-wide elections noted above, Dr. Binford also analyzed the results from each precinct in the 1984 presidential election with Jessie Jackson as a candidate. Dr. Binford found that the R^2 figure was .91 and the correlation was .96 (R5-121). Dr. Binford concluded that there was, therefore, "a very strong relationship between the registration characteristics of the precincts and percentages of votes that he received." (R5-121).

The record evidence shows that Carroll County, in using the at-large system of election for a single commissioner, constitutes a district of 495 square miles (R4-99-3).

The county has a total population of 56,346 (R5-109). Dr. Willingham, a political science expert witness testified that it would be difficult for blacks to campaign for elective office (R7-153, 190, 217). The unusually large size of the district adversely impacts the ability of blacks to run and campaign since the costs of campaigning over such a large area are prohibitive to potential black candidates (R7-190, 217). A majority vote is required before any person can be elected commissioner of Carroll County. Ga. Code Sec. 21-2-501 (1983).

The record likewise presented evidence of election practices exacerbating the deficiencies in black participation. There was testimony at trial which indicated that the location of voter registration facilities intimidated blacks who consequently did not seek to register to vote due to such feelings of intimidation (R5-185, R6-64-65). Furthermore, there was testimony from Robert Springer, a Respondent, and deputy registrar in Carroll County, that black registrars had problems in assisting other blacks in voting (R6-216-217, R7-39). Mr. Springer and other witnesses testified that only after the initiation of this lawsuit were satellite registration sites established in the black community even though such sites had long been requested to be established in predominately black areas (R6-62, 214-215, R7-35-37). Prior to the setting up of the satellite registration sites, Mr. Springer related incidents involving difficulties in obtaining sufficient voter registration cards and use of a local library as a voter registration site (R6-213-214). The record evidence shows that black persons in Carroll County are still registered to vote in disproportionately low numbers in Carroll

County (R5-100). Over the years the practices and procedures encompassing the registration machinery in Carroll County has been used to preclude black access to the election process.

Mr. Jeff Long, a black candidate for county commissioner in 1976, testified that there were community-based forums sponsored by local groups, to which he was not invited (R5-180-181). Mr. Long also testified that unlike other candidates for office in Carroll County, he was prohibited from placing campaign literature in mailboxes without stamps (R5-181). Mr. Narva Farris, a black candidate for sheriff in 1980 and 1984, testified that he did not get the support from the influential, powerful people in Carroll County who supported candidates for office (R6-178-179). Moreover, Mr. Robert Springer testified that he felt the reason why Ms. Anne Shepard, a local black candidate to the City Council of Carrollton, was unsuccessful in her 1983 race for city council was that "the established group in Carrollton was not ready for a black council person" (R6-219).

Blacks in Carroll County are economically disadvantaged as compared to whites (R4-99-6). The 1980 census reveals that black families have a median income of $11,168 (R6-153). Conversely, white families have a median income of $17,118 (R6-153-155). Nine percent (9%) of white families in the county have incomes below the poverty level; whereas, thirty percent (30%) of black families live below the poverty level (R6-152-153). The record evidence further shows that blacks are more likely than whites to live in substandard housing and less likely to have a high school education (R6-147-152).

In addition, there was testimony at the trial regarding the effects of discrimination in employment for blacks in Carroll County. Testimony elicited at trial showed that upon integration, several black principals and coaches at formerly black schools were demoted to assistant principals and coaches (R2-74, R3-49-51). There has been a general reduction in the number of black teachers in the school system (R2-74, R3-49-51), and there are no blacks holding administrative positions in the school system (R2-74). Furthermore, the record evidence shows that while a disproportionately small number of blacks have worked in local government offices, the county has not hired blacks in numbers that are proportionate to their numbers in the general population (R3-64-67). The record evidence likewise shows that throughout the county there continues to be discrimination in employment against black persons (R3-71-72).

The record evidence supports the conclusion that the extent of past discrimination in such areas as education, employment and health has hindered the ability of blacks to participate effectively in the political process in Carroll County. While the extent of such discrimination has narrowed in recent years, the adverse effects on participation in the political process still exists.

The evidence indicates that there have been racial appeals in political campaigns in Carroll County. The District Court's conclusion to the contrary was celarly erroneous. Mr. Jeff Long, a black candidate for county commissioner in 1976, testified concerning a specific incident of a direct racial slur during his campaign (R5-186). Mr. Long stated that he had been informed by a colleague that

an opponent had stated to a public gathering that "if they didn't wake up they'd wind up the day after election with a nigger commissioner." (R5-186).

In addition, the testimony at the trial of the case showed that black voters were intimidated in registering to vote at the courthouse and other voter registration sites then in existence (R5-185, 186, R6-64-65).

The record establishes that in the present case no black person has ever been elected to the office of Carroll County Commissioner (R4-99-9). No black person has ever been elected to a county-wide position in Carroll County. Jeff Long, a Respondent and a black adult citizen of Carroll County, ran unsuccessfully for County Commissioner in 1976 (R5-186, 199). Mr. Long testified that despite his efforts in waging a strong campaign, he was unable to win election to the single commissioner seat under the present election system (R5-186-188).

Likewise, Narva Farris, a black adult citizen of Carroll County, ran unsuccessfully for sheriff twice, once in 1980 and again in 1984 (R6-167). Mr. Farris, too, testified that he, despite his qualifications, past experience, and hard campaigning, was unable to win the office of sheriff (R6-173-177, 187).

The record is replete with examples of the unresponsiveness of Carroll County public officials to the needs of the black community. One example of the gross unresponsiveness is in the area of government hiring and board appointments. While the office of commissioner is only directly responsible for hiring from about six to eight employees, Mr. Duncan, the former four term commissioner, admitted that during his 16 year administration

no blacks were hired for these positions (R5-60). Moreover, there was no affirmative action hiring policy for the county (R5-59). Indeed, in exercising his power "in selecting and appointing all minor officers of the county whose election or appointment is not otherwise fixed by law," 1983 Georgia Laws 4657 at 4660, only one black was ever appointed to a county board position during the 16 years Horrie Duncan was county commissioner (R5-192).

The record reveals a strong showing of functional unresponsiveness in Carroll County government. Mr. Duncan indicated in his testimony at trial that while the county received federal grant funds and revenue sharing funds, little, if any, of the money was used to provide housing, health care, paved roads, water services or other much needed areas of public service to the predominately black areas of Carroll County (R5-33-35, 64-65, 67). Nor were any surplus county funds used for these purposes during Horrie Duncan's long-standing term in office (R5-68).

The District Court characterized the failure to pave roads as a result of "fiscal restraint" (R4-99-12). The record more accurately reflects, however, that certain roads were not paved because the county reportedly miscalculated the funds needed to pave roads without accounting for inflation and used grant funds for purposes other than originally designated in federal grant applications (R5-32, 34, 38-42). The District Court acknowledged that the policy on road paving was unclear (R4-99-11, 12).

The evidence of record supports the conclusion that the policy underlying the sole commissioner form of government in Carroll County is tenuous. Carroll County has

been governed by a one-man commission since 1951. 1951 Ga. Laws 3310. During 1968 to 1984, Respondent Horrie Duncan occupied the office of commissioner (R5-22). While the present commissioner, Tracey Teal, testified that, in his opinion, a single commissioner form of government is more efficient and accountable to the residents of the county (R8-97), the record shows that this form of government has in fact been run in a haphazard and inefficient manner. Mr. Duncan admitted that no formalized meetings were held when he was in office and those that were held were not regularly advertised (R5-62-63). The office was inefficient in that surplus funds were kept in the county budget while numerous public services went unprovided, especially in predominately black areas of the county (R5-67-68, R8-108).

Prior to 1951, Carroll County had been governed by a three-man commission. 1943 Georgia Laws 844. In 1947 Willis Smith, a State Representative from Carroll County, introduced in the legislature a bill to establish a one-person commission in Carroll County. This bill was subject to a referendum of voters in the county but was not enacted until reintroduced in 1951. The one-person commission became effective in 1953.

Inferential evidence that the 1951 bill which created the one-person commission was imbued with a racially discriminatory purpose is the fact that Willis Smith, the representative who initially introduced the legislation in 1947, also made a speech during that same term of the legislature urging his fellow representatives to support passage of the white primary bill which prohibited blacks from voting in primary elections. In support of this bill Rep-

resentative Smith stated "Georgia is in trouble with the Negroes unless the bill is passed. This is a white man's country and we must keep it that way."

———o———

SUMMARY OF ARGUMENT

The primary consideration Petitioners urge upon this court as justification for this court to grant a writ of certiorari is that the decision of the Eleventh Circuit below is in conflict with the decision of the Second Circuit in *Butts v. City of New York,* 779 F.2d 141 (2d Cir. 1985). The claim by Petitioners that the ruling in *Butts* creates a conflict between the decisions of two Circuit Courts of Appeal is wholly misplaced. The court in *Butts* explicitly stated that its holding did not reach the issue of whether and how Section 2 of the Voting Rights Act applied to single-member offices. The court stated that its holding was limited to whether the State of New York run-off election requirement denied any class of voter an opportunity for equal representation in elections for the mayorship of New York City. There is no conflict between the circuits as to application of Section 2 to single-member offices.

In ruling as it did in the case below, the Eleventh Circuit followed the most recent and authoritative rulings of this court. *Thomburg v. Gingles,* — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), provided the substantive framework upon which the Eleventh Circuit crafted its holding in *NAACP v. Stallings, et al.,* 829 F.2d 1547 (11th Cir. 1987). *Gingles* is the only holding by this court on the

Voting Rights Act of 1965, since the 1982 amendments to the Act. The Eleventh Circuit was quite appropriate in utilizing the substantive law of *Gingles* upon which to fashion its opinion. There was no departure by the Eleventh Circuit from the accepted and usual course of judicial proceedings in deciding the case below.

The relative importance of the Eleventh Circuit's opinion within the context of this Court's role in supervising the federal judiciary on questions of important federal law is very low. The Eleventh Circuit's decision has no import outside the 24 or so counties out of 159 counties within the State of Georgia who have authorized the peculiar form of government known as the sole commissioner form of government. This form of government is non-existent to any other state in the union.

Since the sole commissioner office holder is empowered with legislative, executive and some judicial powers, any decision with respect to the application of Section 2 of the Voting Rights Act to this office is clearly distinguishable from, and of no import, to purely executive single office holders such as those of governor, district attorney, or other single-member office. Therefore, the opinion of the Eleventh Circuit does not involve an important issue of federal law which has not been but should be decided by this court.

———o———

ARGUMENT

I.

1. THERE IS NO CONFLICT BETWEEN THE OPINION BELOW AND THE OPINION OF THE SECOND CIRCUIT IN BUTTS v. CITY OF NEW YORK, 779 F.2d 141 (2D CIR. 1985)

The decision of the Second Circuit Court of Appeals in *Butts v. City of New York*, 779 F.2d 141 (1985) is in no respect in conflict with the decision of the Eleventh Circuit below. The issue presented in *Butts* was whether a New York statute, which required a run-off election in a city primary if no party candidate received more than 40% of the vote, was violative of the Constitution and the Voting Rights Act. In upholding the statute the court found that there was no racially discriminatory purpose in the enactment and maintenance of the law by the State of New York. The court also found that, as to the Voting Rights Act claim, there was no discriminatory effect on racial minorities since it was undisputed that the run-off law had not had any actual discriminating effect since the only minority candidate to whom it had applied had actually been given a second chance to win the mayoralty nomination by virtue of the law. *Id.* at 145, note 5.

The issue in *Butts* in no way involved the question of at-large voting and its dilutive effect on equal minority participation in the electoral process. While the court did by way of dicta speak to the application of Section 2 to a single member office it did so only obliquely and not in the context of the facts *sub judice*. The Court in *Butts* hypothesized as follows:

> "Of course, it is possible to deny minority members an equal voice in filling a single-member office; this could occur, for example, if the office were chosen by a convention of delegates or a council of office-holders that had been selected on a basis that denied class members an equal opportunity to secure representation in the convention or council. But so long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. *We need not determine whether such opportunity could ever be denied in the context of an election to a single-member office. It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act.*" 779 F.2d 141, at 149. (Emphasis added)

Respondents would also add that even if *Butts* had involved the application of Section 2 of the Voting Rights Act to the at-large feature of an electoral arrangement for the election of a single-member office the same results might permissibly have been called for given the nature of the office involved. That is, where the single-member office is essentially executive in nature, as was the case in *Butts,* which involved the mayoralty of the City of New York, as opposed to legislative or both legislative and executive, as is the case with the single commissioner form of government in Carroll County, different statutory and constitutional considerations might very well apply given the constitutional dimensions of our tricameral form of government on both the federal and state levels. Likewise there is a strong constitutional foundation for multi-member geographical representation in the legislative branch of both the federal and state levels of government. There-

fore, where a single-member office has sole power to perform both legislative and executive responsibilities, inquiry must be made as to the tenuousness or lack thereof, of such an electoral arrangement in light of the strong constitutional preference for multi-member geographical representation in the legislative branch of government. Respondents would argue that even more scrutiny is warranted for such an electoral format where there is actual discriminatory effect precluding equal minority participation in both the legislative and executive branches of government.

In any event, the issue of whether Section 2 of the Voting Rights Act applies to a single-member office was never decided in *Butts v. City of New York, supra,* consequently, there is no conflict between the decision below of the Eleventh Circuit and the decision in *Butts.*

2. THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DECIDING THE CASE BELOW SO AS TO CALL FOR AND EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Whether a circuit court of appeals so far departed from the accepted and usual course of judicial proceedings in deciding the case below so as to call for an exercise of this Court's power of supervision is a consideration this Court must address in determining whether to grant a writ of certiorari. Supreme Court Rule 17.1(a).

It can hardly be said that the Eleventh Circuit did anything but apply the relevant statutory and decisional

law to the facts of this case. In fact the court based its decision on the only case which this court has decided under Section 2 of the Voting Rights Act of 1965, as amended June 29, 1982. *See, Thornberg v. Gingles*, — U.S. —, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

Gingles was, and is, an exhaustive analysis and synthesis of all relevant Section 2 cases both pre and post the 1982 amendments to Section 2 of the Act. It is without dispute a rendition of the most definitive state of the law on application of Section 2 of the Act to at-large electoral formats which are challenged on the basis of minority vote dilution.

The Eleventh Circuit applied the substantive holding of *Gingles* to the facts of this case without error or deviation. Therefore, it cannot be contended that the circuit court so far departed from the accepted and usual course of judicial proceedings, in deciding the case below, as to call for an exercise of this court's power of supervision.

2. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

In light of this court's decision in *Gingles*, it cannot be seriously contended that the Eleventh Circuit's decision below has decided an important issue of federal law which heretofore had never been or should be decided by this Court. The *Gingles* decision, throughout its 44 pages of the Supreme Court Reporter, addresses almost all, if not all, of the substantive issues presented in this case. Moreover, those issues, if any, that it does not directly address

can easily be resolved by application of the holding in *Gingles*.

This is exactly what the Eleventh Circuit did in its opinion in the case below. It applied the same tests *Gingles* sanctioned in validating or invalidating multi-member electoral formats to single-member electoral devices. The same factors *Gingles* recognized as dispositive in multi-member challenges, i.e., (1) existence of a racial bloc voting majority, (2) a geographically compact minority group claiming dilution of its vote, and (3) the existence of political cohesiveness within the minority group, are equally as dispositive within the context of a Section 2 violation on single-member offices.

In addition, the ultimate impact of the Eleventh Circuit decision is extremely limited. The State of Georgia is the only state in the union that has the sole commissioner form of local government. Within the State of Georgia only 24 of its 159 counties maintain this form of government and in the majority of those counties the population is so overwhelmingly consistent of the majority population that they could not be held to be dilutive of minority voting strength. Therefore grant of a writ of certiorari to review the Eleventh Circuit's opinion would not be provident.

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CONCLUSION

Respondents urge this Honorable Court to deny Petitioners' petition for a writ of certiorari. There is no conflict between the opinions of the Circuits that would authorize such a writ. Nor did the court below so deviate from accepted judicial proceedings so as to warrant invocation of this court's power of supervision. The opinion of the Eleventh Circuit is limited to a small number of local governments in one state of the union. The decision of the Eleventh Circuit involves no important questions of federal law which have not already been addressed by this court or which should be addressed by this court. For the above and foregoing reasons Respondents urge this Honorable Court not to grant a Writ of Certiorari.

Respectfully submitted,

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